TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 64.

THE SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

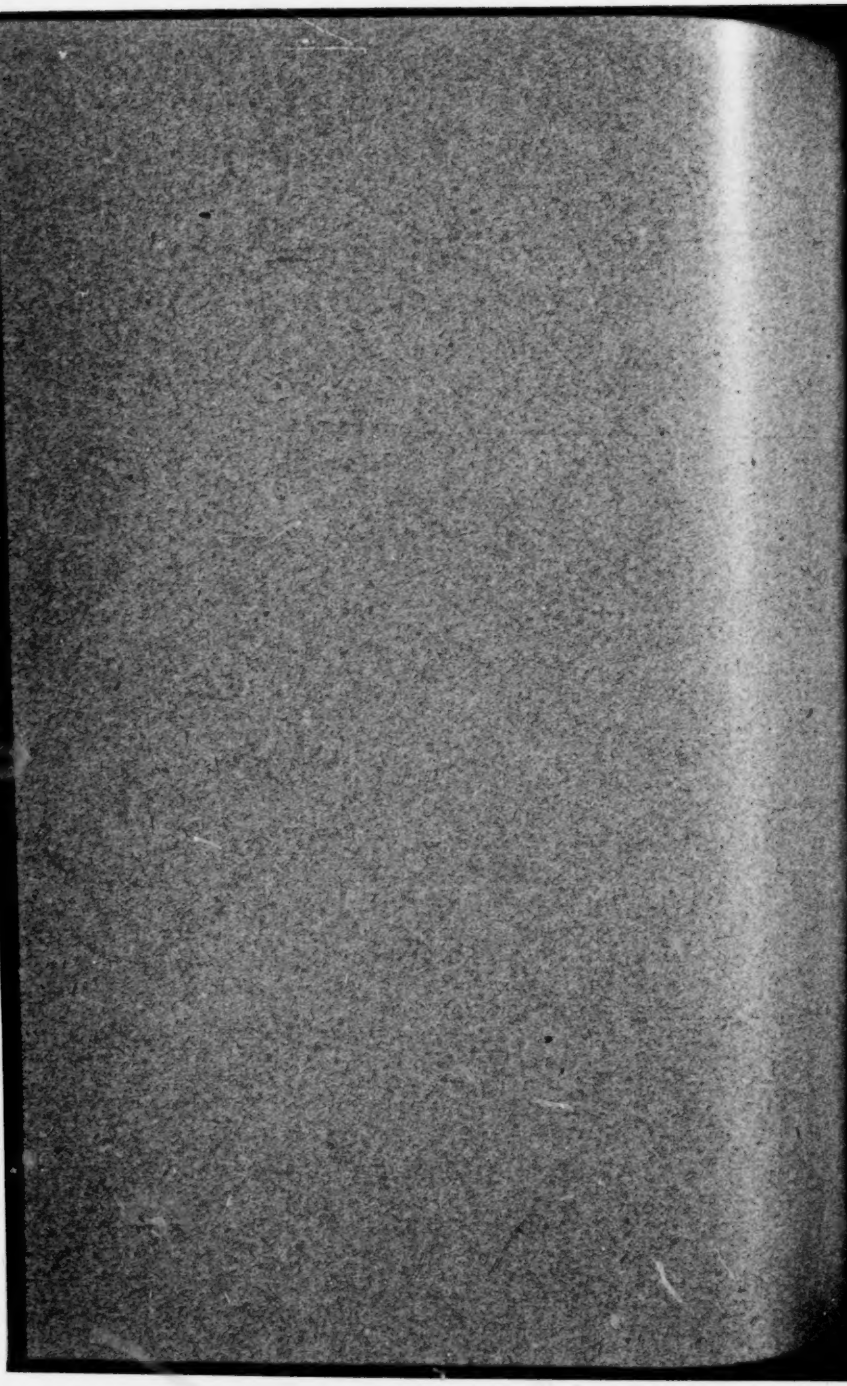
vs.

THE POSTAL TELEGRAPH-CABLE COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED MAY 22, 1899.

(17,417.)



(17,417.)

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY.

OR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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TED STATES OF AMERICA, *ss:*

ited States circuit court of appeals for the fourth circuit, held at the court-house, in the city of Richmond, on the lay of February, being the seventh day of the same the year of our Lord one thousand eight hundred and —present, Hon. Nathan Goff, circuit judge; Hon. Morris, district judge; Hon. William H. Brawley, dis—among other were the following proceedings, to wit:

RAILWAY COMPANY, Plaintiff in Error, *vs.* LEGRAPH-CABLE COMPANY, efendant in Error.	No. 298. Error to the Circuit Court of the United States for the Western District of North Carolina, Greensboro.

nembered that heretofore, to wit, on the 8th day of De-98, transcript of the record of the said circuit court in titled cause, with the writ of error attached, was trans-nd filed in our said circuit court of appeals here, which ws, to wit:

Transcript of Record.

STATES OF AMERICA, } *To wit:*
strict of North Carolina, }

uit court of the United States for the western district of lina, begun and held at the court-house in the city of , N. C., on the second Monday of October, being the 10th same month, in the year of our Lord one thousand eight nd ninety-eight—present, the Honorable Charles H. Si-dge of the circuit court for the western district of North nd within the fourth circuit—among others were the roceedings, to wit:

. TELEGRAPH-CABLE COMPANY *vs.* OUTHERN RAILWAY COMPANY.	No. 502. At Law.

, to wit, on June 25th, 1898, an attested copy of the rec-above-entitled cause from the superior court of Guilford C., is received, docketed, and filed in this court, at Greens-in the words and figures as follows, to wit:

Summons.

GUILFORD COUNTY:

In the Superior Court.

POSTAL TELEGRAPH-CABLE COMPANY
against
THE SOUTHERN RAILWAY COMPANY. } Summons.

The State of North Carolina to the sheriff of Guilford county, Greeting:

You are hereby commanded to summon The Southern Railway Co., the defendant above named, if it be found within your county, to appear before the clerk of the superior court for the county of Guilford, at his office in Greensboro, on the 22 day of June, 2 1898, and answer the petition which will be deposited in the office of the said clerk of the superior court of said county within ten days after the issuing of this summons. And let it take notice, that if it fail to answer said petition within the time prescribed by law, the plaintiff will apply to the court for the relief demanded in the petition. Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 11 day of June, 1898.

ED. L. RAGAN,
Clerk Superior Court, Guilford Co.

Endorsed: Summons for relief. Returnable on the 22nd day of June, 1898, into the office of the clerk of the superior court for Guilford Co.

Return.

Received June 11, 1898.

Served June 11, 1898, by delivering a copy of the within summons and petition to W. E. Coffin, agent for the Southern Railway Co., at Greensboro, N. C.

J. A. HOSKINS,
Sheriff of Guilford Co.,
By J. H. DAVIS, *D. S.*

Officer's fee, $1.20.

Endorsed: Filed in this office June 25, 1898. Sam'l L. Trogdon, clerk.

Prosecution Bond.

NORTH CAROLINA, }
ford County. }

POSTAL TELEGRAPH-CABLE CO. }
vs. }
SOUTHERN RAILWAY COMPANY. }

Postal Telegraph-Cable Company, principal, and A. L.
d John B. Farris, security, acknowledge ourselves to be
the Southern Railway Company in the sum of two hun-
rs. The conditions of the above obligation are such that
e said principal obligor is about to institute proceedings
erior court in said county against the said defendant
way company. Now, if the said plaintiff, the said Postal
egraph-Cable Company, shall pay the defendant railway
pany all such costs as the defendant may recover of it
ion, then the above obligation shall be void; otherwise
in full force and effect.
our hands and seals this the 11 day of June, 1898.

POSTAL-TELEGRAPH CABLE CO.,
By J. R. McINTOSH, *Agent & Att'y.*
J. R. McINTOSH.
A. L. BROOKS.
JOHN B. FARRISS.

d: Filed in this office June 25th, 1898. Sam'l L. Trog-

Petition.

NORTH CAROLINA, }
ilford County. }

Superior Court, before the Clerk.

POSTAL TELEGRAPH-CABLE CO. }
vs. } Petition.
THE SOUTHERN RAILWAY CO. }

etitioner, The Postal Telegraph-Cable Company, represents
a corporation, duly incorporated and chartered under the
e State of New York, with authority to construct, main-
operate telegraph lines throughout the State of New York,
States of the United States of America, including the State
Carolina. And by virtue of chapter 49, of the Code of
rolina of 1883, and the acts of the General Assembly of
amendatory thereof, desires to construct, maintain and
line of telegraph along and upon the right of way of the
Railway Company, from a point on the State line between
of North Carolina and Virginia, where said railroad right

of way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh in said State, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, the whole distance being about 193 miles.

4 The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by petitioner and others to be constructed, owned and operated by it, making complete telegraph connections throughout the United States of America, Canada and Mexico, with cable connections to Europe.

Petitioner represents that it has failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines upon the right of way aforesaid, and for the purpose aforesaid, with the said defendant railway company, and that it has given security for the costs of these proceedings.

That said defendant railway company extends to and runs within the town of Greensboro, in said county of Guilford, and has an agent located therein, upon whom service may be had in these proceedings, as provided for in section No. 2011 in the State Code.

Your petitioner desires to construct its telegraph line upon the west side of the line of track of said railroad from the town of Charlotte, aforesaid, to the said State line, and on the south side of said railroad track from the said town of Greensboro, in the said county of Guilford, to the city of Raleigh, in the county of Wake, and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of right of way, unless it be that at some points of said right of way, at that distance from said outer edge, there be found obstructions that will prevent the erection of said poles at such points, then, in such event, petitioner proposes to erect said poles as near said outer edge of said right of way, as can be done without interference with any other line of telegraph, or other construction on said right of way.

Petitioner represents that the said Southern railway is a single line, with its railroad bed constructed at or near the centre of its right of way, and that its track is about 4 feet 8½ *guage*, together with switches, turnouts, stations, side tracks, turn-tables, water tanks, &c., such as *is* necessary to carry on and operate a single line of railway. That the right of way of said railway is about one hundred feet wide, and extends about fifty feet from a line along the centre between the rails of said main track.

That the line of telegraph to be constructed by petitioner will be of best material, and upon the most improved plan, with poles about twenty-six feet in length, and one foot in diameter at the base, and will be firmly planted in the ground at a depth of not less than five feet, and upon such poles will be attached such suitable cross-arms about six feet in length, fastened near the top of said poles

5 with insulators thereon, upon which will be strung, at or near the upper end, wires of suitable material, and of suitable

number, so as to enable petitioner to promptly transmit all telegraphic messages entrusted to it. There will be about 35 poles to the mile.

In places where its lines cross the track, or where it is necessary to do so to prevent interference with any work, use or structure, or the operation of any trains of said railway company, petitioner's poles will be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company as to prevent any interference therewith.

The said cross-arms will extend the same distance on each side of said poles. Said poles will be so erected, and said telegraphic line so constructed and maintained as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way.

In the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track, or construct new tracks, or side tracks, where same do not now exists, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railroad company, upon reasonable notice, and at the expense of petitioner.

Petitioner will not construct its line, or in any way attach the same, to any of the trestle-work or bridges of said railroad company, or upon any of its embarkments.

Said telegraph line, when constructed, will in no way damage the property of said railroad company, nor impair nor diminish the value of said right of way for railroad purposes, but that the same will be beneficial to said railroad company and its patrons.

The said defendant railroad company is duly incorporated, doing business by virtue of its charter with a right of way of 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

Petitioner does not desire by these proceedings to secure the fee to any part of the right of way of said defendant railroad company, but only to obtain the right to construct, maintain and operate over, along and upon said right of way of the said railroad company, a telegraph line as aforesaid.

6 Your petitioner prays for the rights and privileges hereinbefore enumerated for the *bona fide* purposes of obtaining said easement and right of way, in order to erect, maintain and operate the said telegraph line for the benefit and accommodation of the general public, and prays that a copy of this petition, with notice of time and place, be served upon the defendant, when the same will be presented to the superior court, at least ten days prior to the presentation of same to this court, and that such proceedings may

be had, and orders made and judgments entered as are in such cases provided for by statute, and as in duty bound will ever pray.

J. R. McINTOSH.
Agent & Att'y for the Postal Telegraph-Cable Co.
BOYD & BROOKS,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA, }
County of Guilford. }

This day personally appeared before me, J. R. McIntosh, who being duly sworn says, he is the agent and attorney of the petitioner, The Postal Telegraph-Cable Company in the foregoing cause, and that he personally, as such agent and attorney, has knowledge of the truthfulness of the facts therein stated, and that the same are true, and that such knowledge has come to him as the agent and attorney of said petitioner by observing the manner of the construction of the telegraph lines and the manner in which the same has been operated and managed, and from his personal intercourse with and information derived *for*, the general officers of said corporation.

That, *that* this affidavit is not made by an officer of petitioner for the reason that it is a foreign corporation, and that none of its officers reside in this State.

J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.

Sworn to and subscribed before me this June 11th, 1898.
ED. L. RAGAN, *C. S. C.*

7 *Superior Court Clerk's Certificate to Copy of Petition.*

NORTH CAROLINA, }
Guilford County. }

I, Ed. L. Ragan, clerk of the superior court, in and for said county, do hereby certify that the foregoing is a true and perfect copy of the complaint, or petition, now on file in this office in case of Postal Telegraph-Cable Company *vs.* The Southern Railway Co.

In testimony whereof, I have hereto set my hand and official seal at office in Greensboro, N. C., this June 17th, 1898.

[SEAL.] ED. L. RAGAN, *C. S. C.*

Special Appearance by Defendant's Attorneys.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* SOUTHERN R'Y COMPANY. } Entry of Special Appearance.

Mr. Rob't Stiles and Mr. F. H. Busbee entered a special appearance for the defendant, for the purpose of entering a motion to remove the suit to the U. S. circuit court, and filing petition and bond.

JUNE 22, 1898.

And, thereupon, on said June 22, 1898, the defendant filed in the said superior —, the following petition and bond:

Petition for Removal to Circuit Court.

STATE OF NORTH CAROLINA,
County of Guilford.

Superior Court, June 21st, 1898.

THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff,
against
THE SOUTHERN RAILWAY COMPANY, Defendant.

Petition for order to remove this cause to the United States circuit court for the western district of North Carolina.

To the honorable the superior court of the county of Guilford, State of North Carolina:

Your petitioner, The Southern Railway Company, respectfully showeth that it is the defendant in the above-entitled suit or
8 civil action, which was begun against it in said superior court of Guilford county, North Carolina, by the issuance and service of a summons, and that a complaint or petition has been filed in said action, and that the defendant, your petitioner, files this petition at or before the time when it is obliged to answer or demur to the complaint or petition.

That the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the said suit — of civil nature, and is an action for the condemnation to the use of the plaintiff of certain rights of way of defendant in many counties of N. C., a large part of the said rights of way being situate in the western district of North Carolina.

Your petitioner further states that in the said above-mentioned civil action there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which was, at the commencement of this action, and still is, a citizen and resident of the State of Virginia, and the said Postal Telegraph-Cable Company who, your petitioner avers, was, at the commencement of this action, and still is, a citizen and resident of the State of New York, and is carrying on the business of a telegraph company in the State of North Carolina, and that both the said Postal Telegraph-Cable Company and your petitioner are actually interested in said controversy.

And your petitioner offers herewith a bond with good and sufficient surety in the sum of five hundred dollars for its entering in the circuit court of the United States for the western district of North Carolina, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded

by said circuit court, is said court shall hold that this action was wrongfully or improperly removed thereto, and for entering special bail, if such be required.

And your petitioner prays this court to proceed no further herein, except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the western district of North Carolina.

SOUTHERN RAILWAY COMPANY,
By ROB'T STILES AND
F. H. BUSBEE,
Its Attorney-.

9 STATE OF NORTH CAROLINA, }
County of Guilford. }

F. H. Busbee, being duly sworn, doth say that he is attorney of The Southern Railway Company, the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the matters therein stated are true, except as to matters stated on information and belief, and as to these he believes it to be true.

F. H. BUSBEE.

Sworn — and subscribed before me this June 22, 1898.
ED. L. RAGAN, *C. S. C.*

Endorsed: Filed June 22, 1898. Ed. L. Ragan, C. S. C.

Bond for Removal to Circuit Court.

NORTH CAROLINA, }
Guilford County. }

Superior Court, June 22d, 1898.

THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff, }
against }
THE SOUTHERN RAILWAY COMPANY, Defendant. }

Bond for removal of this cause to the United States circuit court for the western district of North Carolina.

Know all men by these presents that the Southern Railway Company, as principal, and W. B. East, as surety, are held and firmly bound unto the Postal Telegraph-Cable Company, and all other persons whom it may concern, in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the said Southern Railway Company has petitioned the superior court of Guilford county, State of North Carolina, for the removal of certain

vil action therein pending, above mentioned, wherein The Postal elegraph-Cable Company is plaintiff and The Southern Railway ompany is defendant, to the circuit court of the United States in and for the western district of North Carolina.

Now, if the said Southern Railway Company, your petitioner, shall enter in the said circuit court of the United tates for the western district of North Carolina, on the first day of s next session, a copy of the record in said action, and shall well nd truly pay all costs that may be awarded by said circuit court f the United States, if said court shall hold that said action was rongfully or improperly removed thereto, and shall also then appear and enter special bail, if special bail be requisite therein, and hall enter appearance of said Southern Railway Company in said ourt, then this obligation shall be void; otherwise to remain in ll force and effect.

Witness our hands and seals this 22 day of June, 1898.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By F. H. BUSBEE.
W. B. EAST. [SEAL.]

UILFORD COUNTY, *ss:*

W. B. East, being duly sworn, saith that he is a resident of Guilord county, North Carolina, and that he is worth double the sum pecified in the above bond above all his debts and liabilities and xclusive of property exempt by law from execution.

W. B. EAST.

Sworn to and subscribed before me this 22 day of June, 1898.

ED. L. RAGAN, *C. S. C.*

Endorsed: Filed June 22, 1898. Ed. L. Ragan, C. S. C.

Order Overruling Motion to Remove Cause to Circuit Court.

POSTAL TELEGRAPH-CABLE CO. }
vs.
THE SOUTHERN RAILWAY CO. }

The motion of the Southern Railway Company for removal of id cause to the circuit court of the United States for the western strict of the State of North Carolina, coming on to be heard by e court upon the papers filed, is hereby overruled.

This court holding that the amount in controversy is not shown by the pleadings in said cause to be as much as $2,000, and from the facts stated in the petition of the Postal Telegraph-Cable Company, the court is of the opinion that the amount damages to which the railroad is entitled from the telegraph mpany for the rights and privileges sought in said petition are ss than $2,000. The said railway company is given 20 days in

which to file its answer with the clerk of this court to the petition of said telegraph company.

This 22 June, 1898.

W. S. O'B. ROBINSON,
Judge Presiding.

To the order overruling the motion to remove defendant excepts.

Superior Court Clerk's Certificate.

NORTH CAROLINA, }
Guilford County. }

I, Ed. L. Ragan, clerk of the superior court in and for said county, do hereby certify that the foregoing is a true and perfect copy of the proceedings in the above-entitled cause, to wit: The Postal Telegraph-Cable Co. *vs.* Southern R'y Co., as appears on file in this office.

In testimony whereof I hereunto set my hand and official seal at office, in Greensboro, N. C., this June 23rd, 1898.

[SEAL.] ED. L. RAGAN, *C. S. C.*

Endorsed: Filed in this office June 25th, 1898. Sam'l L. Trogdon, clerk.

Affidavit of A. B. Kimball.

I, Ashbel B. Kimball, being first duly sworn, do make oath as follows, to wit:

That on Saturday, the 25th day of June, 1898, the Postal Telegraph-Cable Company, appeared by Maj. Stedman of the Greensboro, N. C. bar, at the request, as he stated, — J. R. McIntosh, Esq., counsel for said company, and moved Judge Robinson, then presiding over and holding the superior court of Guilford county, for permission to amend its petition heretofore filed in the clerk's office of said court on the 22nd day of June, 1898; said petition asking
12 the condemnation for the purposes of said telegraph-cable company, of the property of the Southern Railway Company, as set out in said petition, by making The North Carolina Railroad a party defendant to said petition; and that the said superior court of Guilford county overruled and denied said motions upon the ground that the counsel for The Southern Railway Company, the sole defendant to said original petition, filed on the 22nd day of June, 1898, had left Greensboro after the entry of the court's order upon said petition on the said 22nd day of June, 1898.

I do further make oath that the said North Carolina railroad is, and was, at the time of the commencement of the proceedings of the Postal Telegraph-Cable Company above referred to, a citizen of the State of North Carolina.

ASHBEL B. KIMBALL.

Subscribed and sworn to before me this July 8, 1898.

ED. L. RAGAN, *C. S. C.*

ndorsed: Filed in this office Jul- 18, 1898. Sam'l L. Trogdon, k.

Affidavit of R. R. King.

, Robert R. King, being first duly sworn, do make oath as fol- s:

'hat on or about the 24th day of June, 1898, the Postal Tele- ph-Cable Company, by J. R. McIntosh, Esq., its counsel, ap- ached me as local counsel for the Southern railway and stated t he had moved Judge Robinson, then presiding over and hold- the superior court of Guilford county, N. C., he being the same ge who heard the original petition in the case herein referred to. the 22nd of June, 1898, and moved the said judge for permission amend its petition heretofore filed in the clerk's office of said rt on the 22nd of June, 1898, asking the condemnation for its poses of the property of the Southern railway, as set out in its l petition, by making The North Carolina Railroad Company a ty defendant to said petition; and that the said McIntosh fur- r stated that the said superior court of Guilford county had de- ied and denied said motion, upon the ground that the counsel The Southern Railway, the sole defendant to the said original ition, filed on the 22nd day of June, 1898, had left Greensboro r the entry of the court's order on said petition on the said 22nd of June, and that said Southern railway was not represented before the court by counsel at the time the Postal Telegraph-Cable Company submitted its said motion to amend its peti- tion as above set out. That this affiant stated to Mr. Mc- osh that he was in no way connected with the case, and did not, l could not, in the absence of express authority, consent to any endment; and affiant further states that on the afternoon of the ie day he was in court and heard the said Postal Telegraph- ble Co., through its counsel, J. R. McIntosh, again renew the tion above referred to, when Judge Robinson again declined l denied said motion.

And I do further make oath that upon Saturday, the 25th day of ne, 1898, said Postal Telegraph-Cable Company, appearing by j. Stedman, of the Greensboro bar, at the request of Mr. McIntosh, ne stated, again moved said superior court of Guilford county llow it to amend its said petition as hereinabove set out, and t said renewed motion was overruled and denied by said court on the same grounds as hereinabove stated with regard to the e motions made on the preceding day. And I do further make h that said North Carolina Railway Company is, and was, at the e of the commencement of the proceedings of the Postal Tele- ph-Cable Company above referred to, a citizen of the State of rth Carolina.

ROBERT R. KING.

ubscribed and sworn to before me this July 8, 1898.

ED. L. RAGAN, *C. S. C.*

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts. attached.

Affidavit of W. P. Cline.

I, W. P. Cline, being first duly sworn, do make oath as follows, to wit: That on Saturday, June 25th, 1898, Mr. Ed. L. Ragan, clerk of the superior court of Guilford county, N. C., stated to me that on Friday, the 24th day of June, 1898, the Postal Telegraph-Cable Company, by J. R. McIntosh, its counsel, appeared in the superior court of Guilford county, North Carolina, and twice moved said court for permission to amend its petition heretofore filed in the clerk's office of said court on the 22nd day of June, 1898, asking the condemnation for its purposes of the property of the Southern Railway Company as set out in its said petition, by making The
14 North Carolina Railroad Company a party defendant to said petition; and that the said superior court of Guilford county overruled and denied said motions, upon the ground that the counsel for The Southern Railway Company, the sole defendant to said original petition, filed on the 22nd day of June, 1898, had left Greensboro after the entry of the court's order upon said petition on the 22nd day of June, 1898, and that said Southern Railway Company was not represented before the court by counsel at the time the Postal Telegraph-Cable Company submitted its said motions to amend its petition, as above set out; and that upon Saturday, the 25th day of June, 1898, said Postal Telegraph-Cable Company, appearing by Maj. Stedman, of the Greensboro bar, in the absence of Mr. Brooks, of counsel for the said Postal Telegraph-Cable Company, who was sick and unable to appear in court, moved said superior court of Guilford county to allow it to amend its said petition, as hereinabove set out, and that said renewed motion was overruled and denied by said court upon the same grounds as hereinbefore stated with regard to the like motions made on the preceding day.

And I do further make oath that upon Friday, July 8th, 1898, the said Mr. Ed. L. Ragan confirmed the statement substantially as above set out, except as to the motion said to have been made by Maj. Stedman, and, as to this, he states the court declined to hear the motion, and upon my request for his affidavit as to the facts above set forth, expressed his willingness to make such affidavit; but, upon further consideration, declined to do so, for the reason that the proceedings above referred to were begun before him in office, and he does not feel entirely satisfied that such action on his part would be proper.

And I do further make oath that, before verifying this statement above set out, I consulted with the said Mr. Ed. L. Ragan, and obtained his assent to its correctness.

W. P. CLINE.

scribed and sworn to before me this July 8th, 1898.

ED. L. RAGAN, *C. S. C.*

dorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

venue stamp 10 cts. attached.

Affidavit of Z. V. Taylor.

Z. V. Taylor, of the firm of Bynum, Bynum and Taylor, attor-at-law, being duly sworn, do make oath as follows, to wit: on Friday, June 24th, 1898, I was present at the session of the ior court of Guilford county, N. C., and just as court adjourned, rd Col. McIntosh, counsel for the Postal Telegraph-Cable Co., oach his honor, Judge W. S. O'B. Robinson, for the making n motions in a case then pending, or which had been hereto- rgued before his honor; that Judge Robinson told him it was uty to have made the motion when counsel for the opposing es were present in the court, and could have been heard, and hat reason, stated he would not allow the motion or hear any ment concern- it. I was also present during the sitting of ourt on Saturday, June 25th, and heard Major Chas. M. Sted- lodge a motion in court, which, he said, was done at the request friends, Col. McIntosh and Mr. Brooks, the latter being con- to his room on account of sickness. I do not remember what notion was, but do remember that the court refused to allow it.

Z. V. TAYLOR.

scribed and sworn to before me, this July 8th, 1898.

ED. L. RAGAN, *C. S. C.*

dorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

venue stamp 10 cts. attached.

Affidavit of E. T. D. Myers.

RICHMOND, VA., *July 8th*, 1898.

n asked whether the right of way of the telegraph company the right of way owned by the Southern Railway Co. in North na, a length of 193 miles, is worth more than two thousand s ($2,000). In my opinion it is worth much more.

E. T. D. MYERS.

CF VIRGINIA, } *To wit:*
ity of Richmond, }

Personally appeared before me this day, E. T. D. Myers, whose name is signed to the above writing, bearing date July 8th, 1898, and made oath that the statements contained n are true to the best of his knowledge and belief.

en under my hand and seal this 8th day of July, 1898.

ALEX. W. WEDDELL,
Notary Public.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts. attached.

Affidavit of T. M. R. Talcott.

I am by profession a civil engineer, and have been connected with and operating railroads ever since 1854, in almost every department and every capacity, as general engineer, general manager, general superintendent, and I was for some time first vice-president of the Richmond & Danville, now the Southern Railway Company. I am not, however, now connected in any way with the said company.

I am thoroughly well acquainted with the right of way of said company, including its right of way in North Carolina, in the counties in which, as I am informed and have seen from a copy of its petition, the Postal Telegraph-Cable Company is seeking to condemn a right of way for its purposes, embracing the length of 193 miles or more.

I am asked to state whether in my opinion the right of way so proposed to be condemned by the Postal Telegraph-Cable Company is worth the sum of $2,000, exclusive of interest and costs. As a railroad expert, I have no hesitation in saying that said right of way is worth a great deal more than the sum mentioned; that is, that the sum which should be awarded to the Southern Railway Company as a compensation for the right of way so condemned ought, in my judgment, to be largely more than the sum mentioned, to wit: $2,000, exclusive of interest and costs.

This July 9th, 1898.

T. M. R. TALCOTT.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

This day personally appeared before me, a notary public for the city aforesaid, in the State of Virginia, T. M. R. Talcott, to
17 me personally known, whose name is signed to the foregoing writing, bearing date the 9th day of July, 1898, and acknowledged the same before me, in my city aforesaid, and I do further certify that the said T. M. R. Talcott affirmed that the statements therein contained are true, to the best of his knowledge, information and belief.

Given under my hand and notarial seal this ninth day of July, A. D. 1898.

WM. SINTON,
Notary Public.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp, 10 cts., attached.

Affidavit of Frank S. Gannon.

Court of the United States, Western District of North Carolina.

TELEGRAPH-CABLE COMPANY *vs.* HERN RAILWAY COMPANY. } Affidavit of July 9th, 1898.

: S. Gannon, being duly sworn, doth say that he is third sident of The Southern Railway Company, the defendant amed. That he has had for some time official connection railroad company operating the lines of railroad from the e near Danville, Va., to Charlotte, along the Piedmont and th Carolina railroads, and from Raleigh to Winston, along th Carolina and Northwestern North Carolina railroads; has had many years' experience in the operation and man- of railroads, occupying different positions, and is able to an intelligent opinion as to the values of rights of way. e length of railroad along which the plaintiff, in the con- on proceeding above mentioned, desires to erect its poles, is vo hundred and forty-two miles, being about one hundred enty-three miles of the North Carolina railroad, about forty- es of the Piedmont railroad, and about twenty-eight miles Northwestern North Carolina railroad; that, in the opinion ffiant, the value of this right of way to the plaintiff, if con- to the use of the plaintiff, would certainly be largely more dollars per mile, and that the damage sustained by de- ndant by reason of the condemnation and use of its right f way by plaintiff, and erection and maintenance of poles nd wires along said right of way, thereby interfering with it's full control of its right of way, would be more than two l dollars. Affiant is therefore of the opinion that the in controversy in this proceeding is more than two thou- lars.

FRANK S. GANNON.

and subscribed before me this 9th day of July, 1898.

WM. M. NETHERLAND,
AL.] *Notary of Public, Dist. of Columbia.*

sed: Filed in this office July 18th, 1898. Sam'l L. Trog- k.

Affidavit of R. M. Sully.

RICHMOND, VA., *July* 9, 1898.

been connected with railroads about forty years; first as ngineer and then in various positions in the traffic depart- have been superintendent and general superintendent for In 1885 I was the general superintendent of the Peters-

burg Railroad Company. Upon the consolidation of the Petersburg railroad with the Atlantic Coast line, I became the superintendent of the Richmond and Petersburg and the Petersburg Railroad Companies, which position I have occupied ever since.

I am informed that application has been made to the superior court of Guilford county, North Carolina, by the Postal Telegraph-Cable Company for the condemnation of a right of way for its purposes along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line, thence south, through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus, and Mecklenburg to the town of Charlotte in said last-named county; and from the town of Greensboro, in said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham, and Wake, the whole distance being about 195 miles.

I am further informed that the Southern Railway Company has removed said proceeding to the circuit court of the United
19 States at Greensboro, North Carolina, and that the question has arisen whether or not the matter in dispute, that is, the amount or value of the matter as above put in controversy between the Postal Telegraph-Cable Co. and the Southern Railway Co. exceeds the amount or value of $2,000, exclusive of interests and costs.

It is not difficult to answer this question, but it is difficult to realize that it ever has been seriously raised. I am fairly well acquainted with the right of way and track of the Southern Railway Company in the counties and between the points mentioned above, and have no hesitation in saying, as a railroad expert, that the sum justly due to the Southern Railway Company, as compensation for the proposed condemnation of its right of way, throughout the counties and between the points named, very greatly exceeds in value the sum of $2,000, exclusive of interests and costs, so greatly indeed, that I would find it difficult to express any definite opinion and judgment in this regard.

I am further informed that the said Postal Telegraph-Cable Company agrees, "in the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track or construct new tracks or side tracks where same do not now exist, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railway company, upon reasonable notice and at the expense of petitioner."

Such a provision, if it could be embodied in the order of a court condemning property—as to which I express no opinion—would, of course, tend to lessen the otherwise intolerable embarrassment, destruction and damage to a railroad company involving the enforced occupancy by the telegraph company of its right of way, but

not seriously modify the statement and opinion above
The fact is that the telegraph company which at present
with its lines part of the right of way of the railroads
ch I am connected, is bound by its agreement with the
uthorities to change the location of its poles and lines at
h, and yet that company, in addition to other valuable
tions given by it, is willing to pay, and does pay, for the
rilege of occupancy of the railroad right of way and an-
al per mile, which would indicate a value for the right of
ng the 193 miles of the Southern railway, sought to be
ed by the Postal Telegraph-Cable Company, far in excess
, exclusive of interest and costs.

R. M. SULLY.

ATE OF VIRGINIA, } *To wit:*
City of Richmond, }

Ellis Stern, a notary public for said city, in said State, do
at R. M. Sully, whose name is signed to the attached
bearing date July 9th, 1898, has this day made oath before
he statements contained therein are true, to the best of his
ge and belief.

under my hand and seal this 9th day of July, 1898.

CARY ELLIS STERN,
Notary Public.

ed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

ue stamp, 10 cts., attached.

Affidavit of F. H. Busbee.

rcuit Court of the United States for the Western District
th Carolina, at Greensboro, Fourth Circuit. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
POSTAL TELEGRAPH-CABLE COMPANY.

Busbee, being duly sworn, saith that he was and is of coun-
fendant in the condemnation proceedings instituted in the
court of Guilford county by the Postal Telegraph-Cable
against the Southern Railway Company. That some time
case was called before Judge Robinson, in a conversation
ffiant and Col. McIntosh, leading counsel for the telegraph
Col. McIntosh stated that he had no doubt that commis-
ould be appointed at once by the court, and in effect asked
consent, or not to object or not to interpose delays. Affi-
, in substance, that this would be rather rapid, and, in the
conversation, mentioned the fact that the Southern was
ffiant did not suggest that the N. C. R. R. Co. should be
arty, or presume to advise or make suggestions to opposing

counsel. Affiant's recollection is that Col. McIntosh stated that, in his opinion, it was not necessary to make the lessor a party.

21 In the argument before Judge Robinson, which occurred thereafter, counsel for plaintiff telegraph company stated that he desired to make an amendment by adding another county, which, by consent of the railroad company, was permitted. At no time during or before the argument was there any suggestion whatever that the N. C. R. R. Co. should be made a party, and the first time that any suggestion of this kind was made was in a telegram sent by Col. McIntosh and received by affiant after his return to Raleigh.

That when Judge Robinson indicated his decision counsel for the So. R'y Co. at once stated that the question would be taken to the Federal court.

F. H. BUSBEE.

Sworn and subscribed to before me this 13th day of July, A. D. 1898.

C. B. MOORE, *Clerk*,
Per A. S. PATTERSON, *Deputy*.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts., attached.

Amended Petition.

STATE OF NORTH CAROLINA, *Guilford County.*

Supreme Court, before the Clerk.

POSTAL TELEGRAPH-CABLE CO. *vs.* THE SOUTHERN RAILWAY CO. } Petition.

Your petitioner, The Postal Telegraph-Cable Company, represents that it is a corporation, duly incorporated under the laws of the State of New York, with authority to construct, maintain and operate telegraph lines throughout the State of New York, and other States of the United States of America, including the State of North Carolina. And by virtue of chapter 49, of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof, desires to construct, maintain and operate a line of telegraph along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railway right of

22 way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through

the counties of Guilford, Alamance, Orange, Durham and Wake, and from the town of Greensboro to the town of Winston, in the county of Forsyth, the whole distance being about 193 miles.

The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by it, making complete telegraphic connections throughout the United States of America, Canada and Mexico, with cable connections to Europe. (As amended by order of the court.) And the said Postal Telegraph-Cable Co. has, as required by section 5268 of the Revised Statutes of the United States of America, filed its written acceptance with Postmaster General of the United States, of all the restrictions and obligations by the acts of Congress, approved July 24th, 1866, entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government use of the same for military purposes."

Petitioner represents that it has failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines upon the right of way aforesaid, and for the purpose aforesaid, with the said defendant railway company, and that it has given security for the costs of these proceedings.

That said defendant railway company extends to and runs within the town of Greensboro, in said county of Guilford, and has an agent located therein, upon whom service may be had in these proceedings, as provided for in section No. 2011 in the said State Code.

Your petitioner desires to construct its telegraph line upon the west side of the line of track of said railroad from the town of Charlotte, aforesaid, to the said State line, and on the south side of said railroad track from the said town of Greensboro, in the said county of Guilford, to the city of Raleigh, in the county of Wake, and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of right of way, unless it be that at some points of said right of way, at that distance from said outer edge, there be found obstructions that will prevent the erection of said poles at such points, then, in such event, petitioner proposes to erect said poles as near said outer edge of said right of way, as can be done without interference with any other line of telegraph, or other construction on said right of way.

23 Petitioner represents that the said Southern railway is a single line, with its railroad bed constructed at or near the centre of its right of way, and that its track is about 4 feet 8½ in. guage, together with switches, turnouts, stations, side tracks, turntables, water tanks, &c., such as is necessary to carry on and operate a single line of railway. That the right of way of said railway is about one hundred feet wide, and extends about fifty feet from a line along the centre between the rails of said main track.

That the line of telegraph to be constructed by petitioner will be of best material, and upon the most improved plan, with poles about twenty-six feet in length, and one foot in diameter at the base, and will be firmly planted in the ground at a depth of not less than five feet, and upon such poles will be attached such suitable cross-arms about six feet in length, fastened near the top of said poles with insulators thereon, upon which will be strung, at or

near the upper end, wires of suitable material, and of suitable number, so as to enable petitioner to promptly transmit all telegraphic messages entrusted to it. There will be about 35 poles to the mile.

In places where its lines cross the track, or where it is necessary to do so to prevent interference with any work, use or structure, or the operation of any trains of said railway company, petitioner's poles will be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company as to prevent any interference therewith. The said cross-arms will extend the same distance on each side of said poles.

The said cross-arms will extend the same distance on each side of said poles. Said poles will be so erected, and said telegraphic line so constructed and maintained as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way.

In the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track, or construct new tracks, or side tracks, where same do not now exists, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railroad company, upon reasonable notice, and at the expense of petitioner.

Petitioner will not construct its line, or in any way at-
24 tach the same, to any of the trestle-work or bridges of said railroad company, or upon any of its embankments.

Said telegraph line, when constructed, will in no way damage the property of said railroad company, nor impair nor diminish the value of said right of way for railroad purposes, but that the same will be beneficial to said railroad company and its patrons.

The said defendant railroad company is duly incorporated, doing business by virtue of its charter, with a right of way of 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

Petitioner does not desire by these proceedings to secure the fee to any part of the right of way of said defendant railroad company, but only to obtain the right to construct, maintain and operate over, along and upon said right of way of the said railroad company a telegraph line as aforesaid.

Your petitioner prays for the rights and privileges hereinbefore enumerated for the *bona fide* purposes of obtaining said easement and right of way, in order to erect, maintain and operate the said telegraph line for the benefit and accommodation of the general public, and prays that a copy of this petition, with notice of time and place, be served upon the defendant, when the same will be presented to the superior court, at least ten days prior to the presentation of same to this court, and that such proceedings may be had

and orders made and judgments entered as are in such cases provided for by statu-e, and as in dutay bound will ever pray.

(Signed) J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.
BOYD & BROOKS,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA, }
County of Guilford. }

This day personally appeared before me, J. R. McIntosh, who, being duly sworn, says he is the agent and attorney of the petitioner, The Postal Telegraph-Cable Company in the foregoing cause, and that he personally, as such agent and attorney, has knowledge of the truthfulness of the facts therein stated, and that the same are true, and that such knowledge has come to him as the agent and attorney of said petitioner by observing the manner of the construction of the telegraph lines and the manner in which the same has been operated and managed, and from his personal intercourse with, and information derived from, the general officers of said corporation.

That *that* this affidavit is not made by an officer of petitioner for the reason that it is a foreign corporation, and that none of its officers reside in this State.

J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.

Sworn to and subscribed before me this June 11th, 1898.
ED. L. RAGAN, *Clerk.*

Endorsed: Filed in this office July 22nd, 1898. Sam'l L. Trogdon, clerk.

Opinion Continuing Restraining Order and Refusing to Remand.

THE UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the Circuit Court, Fourth Circuit.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY. } At Law.

THE SOUTHERN RAILWAY COMPANY
vs.
THE POSTAL TELEGRAPH-CABLE COMPANY. } In Equity.

These two cases came up together under these circumstances: The Postal Telegraph-Cable Company entered proceedings in the superior court of Guilford county, in the State of North Carolina, seeking to condemn the right to erect its poles and stretch its wires over and along the right of way of the Southern railway in North Carolina. The petition, among other things, alleged the intention

of the Postal Telegraph-Cable Company to erect its poles and stretch its wires very near the outer limits of the right of way of the railway company, so as in nowise to interfere with its use of its track, and if in any case it should hereafter appear that any of the said poles were obstructing such use that the telegraph company would remove them at its own expense on reasonable notice.

26 Upon the institution of these proceedings the Southern Railway Company filed its petition for removal of the case into this court, relying upon two distinctly stated facts, the diversity of citizenship between it and the telegraph company, and that the matter in dispute exceeded two thousand dollars besides interest and costs. The petition was accompanied by a bond with surety. Application having been made to the State court immediately upon the filing the petition and bond, an order of removal was refused upon the ground solely that the matter in dispute was not of a value exceeding two thousand dollars. The next day after this refusal the Southern Railway filed a transcript of the record in this court. On the same day the Postal Telegraph-Cable Company moved before the State court for leave to amend its proceedings for the purpose of making new parties. This motion was refused because made in the absence and without notice to the defendant's attorney. Because of this, and the fear of other motions, the Southern Railway Company filed its bill setting forth the facts stated above, and praying that the Postal Telegraph-Cable Company be enjoined from seeking to proceed any further in the State court, inasmuch as the cause had been removed into this court. This is the second cause mentioned in the title above set forth. It comes up on the return to the rule issued on filing the bill requiring cause to be shown why an injunction should not be issued as prayed for. The return, after disclaiming all knowledge that the cause had been removed into this court, and disavowing all want of respect thereof, rests upon the position that this court cannot entertain the case as the value of the matter in dispute is less than two thousand dollars.

As precisely the same question is made in the removal case, and as the two cases are closely connected with each other, it was determined to hear argument, with the understanding that the conclusion reached would dispose of both cases.

The controlling question in this matter, then, is, Is the proceeding in the superior court of Guilford county a proper case for removal into this court?

It is not questioned that that proceeding is a suit. Nor can there be any doubt on this point. Kohl *vs.* The United States, 91 U. S., 367; Searl *vs.* School District, 124 U. S, 199; Martin *vs.* B. & O. R. Co., 151 U. S., 673.

It is a suit between citizens of different States, the Postal Telegraph-Cable Company being a corporation of the State of New York, and the Southern Railway Company being a corporation of the State of Virginia.

27 The petition for removal with proper bond was filed before the time for answering had expired. This petition averred the two jurisdictional facts: 1st, the diversity of citizenship. 2nd,

t the matter in controversy exceeded the value of two thousand
lars, exclusive of interests and costs. Upon the truth of these
ts, of both of them, depends the right of removal. Powers *vs.*
t O. R'y, 169 U. S., 99. Issue was joined upon one of these facts,
jurisdictional amount, and the superior court, inadvertently it
ure, passed upon that issue. It could be decided nowhere but
this court. Carson *vs.* Hyatt, 118 U. S., 279; Carson *vs.* Dun-
n, 121 U. S., 421; Burlington, etc., R'y *vs.* Dunn, 122 U. S., 513;
nsas City R. R. *vs.* Daughters, 138 U. S., 298.

This being the case, and the petition on its face stating the two
ential facts for removal, upon the filing of it, the case was *ipso*
to removed and the State court could proceed no farther. Upon
e filing of the petition and bond, that is, just so soon as they were
d. Gordon *vs.* Longest, 16 Peters, 97; Insurance Co. *vs.* Dunn,
Wall., 214; Kern *vs.* Huidekoper, 103 U. S., 485; R. R. Co. *vs.*
untze, 140 U. S., 5; Act of Congress 3rd March, 1875, 18 Statutes
Large, 470.

It is very clear, therefore, that the State court could have taken
other action in this cause from the date of the filing of the peti-
n and bond, and that the efforts of the plaintiff in the State court
procure orders from that court were *coram non judice* and very
perly refused.

The grave question made here is upon remanding this cause to
State court. It is contended that this court has no jurisdiction
ause of the amount of the matter in controversy—that being less
n two thousand dollars.

t has been contended with great ability and eloquence that in
present case the Postal Telegraph-Cable Company seeks to erect
poles on the right of way of the railway company, which has
eady been dedicated to a public use. That it is confined to the
blic use. That, therefore, in estimating the compensation to be
d the railway company the same rule cannot be followed which
ains in the condemnation of the property of a private person.
t such private person holds his property and can put it to any
, and compensation for taking it must be measured accordingly.
e railway company holds its property for a public use only, and
compensation must be measured only by the interference with
performance of its public duty, growing out of the public use.
t the petition declares an intent in no way to interfere with this
public use, and so the compensation to the railway company
for putting up the poles and stretching the wires must be
nominal. Strong as this line of argument is, and however
vincing under other circumstances, it does not apply to the ques-
now at issue. That question is, must this case be remanded.
answer to this question depends upon the matter in contro-
y. What is the matter in controversy? The compensation to
llowed to the railway company for the erection of the poles
stretching of the wires by the telegraph company. The latter
ge that this compensation should be nominal. The former
ge that it should greatly exceed two thousand dollars. The
stion is, does it exceed two thousand dollars? On this question

the petition of the plaintiff in the State court and that of the defendant for removal differ, and on it the issue is joined. "By this phrase," says the Supreme Court, in Smith *vs.* Adams, 130 U. S., 168, *by this phrase*, "matter in dispute," as used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue is one of fact, testimony is taken and its pecuniary value may be determined not only by the money judgment prayed, but in some cases by the increased or diminished value of the property directly affected by the relief prayed as by the pecuniary result to one of the parties immediately from the judgment. See also New England Mortgage Co. *vs.* Gay, 145 U. S., 127; Clay Center *vs.* Farmers, *ibid.*, 224.

In estimating the amount of the matter in controversy, the court is governed by the claim made, provided that there is no reason to believe that the claim has no *bona fide* existence and is only made to secure jurisdiction. Barry *vs.* Edmunds, 116 U. S., 550. This, then, is the mode of ascertaining the amount of the matter in controversy, and it being claimed on the one side that it greatly exceeds two thousand dollars, and wholly denied on the other, the determination of this issue gives this court jurisdiction. The issue must be tried in accordance with the laws of North Carolina in such case made and provided, and on the trial of the issue will come up the points so ably presented by counsel at bar.

Let an order be entered in the equity cause, continuing the restraining order until the further order of this court.

Let an order be entered refusing to remand the cause removed.

CHARLES H. SIMONTON,
Circuit Judge.

July 20, 1898.

29 Endorsed: Filed in this office, June 22, 1898. Sam'l L. Trogdon, clerk.

Order Overruling Demurrer.

In the Circuit Court of the United States for the Western District of North Carolina.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

This cause came before me, at Asheville, to be heard on the petition removed into this court and demurrer thereon, it is ordered, adjudged and decreed, that the demurrer be overruled.

CHARLES H. SIMONTON,
Circuit Judge.

31st August, 1898.

Endorsed: Filed in this office Octo. 8th, 1898. Sam'l L. Trogdon, clerk.

Order Refusing to Remand.

ıe Circuit Court of the United States for the Western District of North Carolina.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

ıis cause came before me upon a motion to remand to the State t, hearing the same, and after argument of counsel thereon, is ordered, that the motion to remand be refused.

CHARLES H. SIMONTON,
Circuit Judge.

ıdorsed: Filed in this office Octo. 8th, 1898. Sam'l L. Trogdon, .

Order Continuing Hearing to August 31st, 1898.

ıe Postal Telegraph-Cable Company having this day presented ition to this court filed herewith, and counsel for the Southern ay being present, ordered that the hearing as to petition be inued to 31st August current, and that on or before that day Southern Railway Company do take such action as to petition fore removed to this court as is provided in the code of North lina respecting the condemnation of lands for purposes similar ose in the said petition.

CHARLES H. SIMONTON,
Circuit Judge.

Aug., 1898.

f't- counsel except.

ıdorsed: Filed in this office Sept. 14, 1898. Sam'l L. Trogdon, .

Defendant's Bill of Exceptions No. 1.

AL TELEGRAPH-CABLE COMPANY
vs.
OUTHERN RAILWAY COMPANY.

Defendant's Bill of Exceptions No. 1.

is cause having been removed from the superior court of Guil- county, North Carolina, to this court, and, at sundry dates, ings and orders having been filed and entered therein as ap- in the record of which this paper is made a part:

it remembered that, on the 18th day of August, 1898, the court an order allowing the plaintiff to file a further petition herein, ed a hearing on said petition for August 31st, 1898, and re- d the defendant, The Southern Railway Company, to take ı both as to said petition and as to the original petition filed

by the plaintiff in this cause, which order is in the words and figures following, to wit: (Here insert order of August 18th, 1898. See order on page 30 of this record), to which order the defendant, The Southern Railway Company, then and there, by counsel excepted. And on the 31st day of August, 1898, (no other proceedings having in the meantime intervened), said Southern Railway Company, by its attorneys, appeared, and, expressly reserving the right further to except to the two petitions of the plaintiff filed in this cause, and to each of them, by leave of court moved to dismiss the said petitions, and each of them, submitting a written paper containing
31 the grounds upon which said motion was based, which paper is in the words and figures following, to wit: (Here insert paper containing 16 grounds of motion to dismiss. See this paper on page 96 of this record.) And the court, having heard argument upon the said motion, took time to consider thereof, and on the 14th day of September, 1898, rendered its opinion in writing, together with an order also in writing overruling the motion to dismiss; but upon the face of said order referring to said motion to dismiss as a demurrer, and which said order was erroneously dated August 31st, 1898, said order being intended, however, as will appear from its terms, only to overrule the defendant's aforesaid motion to dismiss the plaintiff's petition and proceeding, which opinion and order are in the words and figures following, to wit: (Here insert opinion and order. See opinion on page 31, and order on page 29 of this record), to which opinion, action, ruling and order of the court overruling its said motion to dismiss plaintiff's said petitions and proceedings, the defendant, The Southern Railway, by counsel, excepted, and prayed that this, its first bill of exceptions, be signed, sealed, enrolled and made a part of the record, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4 November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Opinion Dismissing Defendant's Second Petition and Authorizing the Appointment of Comm'rs under Section 1945 of N. C. Code.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The Postal Telegraph-Cable Company filed its petition in the superior court of Guilford county, North Carolina, seeking to condemn a right of way over the lands of the Southern Railway Company. The peti-oner sought a right of way for the erection of its

and the stretching of its wires a few feet within the outside of the right of way of the railway company, so as in no way to obstruct or interfere with the use of its track by the railway company. The right of way sought extended through many counties of the State, the whole distance being largely two hundred miles. The only other party to the petition was Southern Railway. Upon the filing of the petition, proceedings were taken to remove the controversy into this court, and a motion to remand having been refused, the case is now here. After cause was retained in this court, the Postal Telegraph-Cable Company filed another application, in effect, praying that pending the proceedings it have leave to go upon the lands of the railway company and construct its line, upon such terms of bond and security as the court should deem proper, at the same time averring that in no event could any other damages be assessed against it except such as were substantially nominal.

The respondent, The Southern Railway Company, now comes and moves that both petitions be dismissed. The motion is, in effect, a demurrer and to sustain it are set out in full sixteen grounds of demurrer. These embrace three general propositions:

1. That there is now no law in the State of North Carolina providing for the condemnation of lands or right of way for the use of telegraph companies.

2. That if there be such law in North Carolina, the petition of the telegraph company in this case has not followed it in essential particulars.

3. That the petition is vague and uncertain in not stating how or by what tenure the lands owned by the railway company are held, whether only as an easement or in fee.

The respondent contends that there is no law in the State of North Carolina providing for the condemnation of land or right of way for the use of telegraph companies.

There is no doubt that any telegraph company, incorporated by any State of the Union, has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided that they be so constructed as not to obstruct or hinder the usual travel thereon. Code of North Carolina, section 2007.

Such right may be obtained from the railway company, owner of the land, franchise or easement therein, by contract. (Code of North Carolina, 1883, section 2008.)

The same code, sections 2009, 2010, provided that failing to make such a contract, the telegraph company could, exercising the right of eminent domain, obtain the right of way desired and the right to erect its poles and establish offices upon making just compensation therefor.

This same right to construct its lines along the right of way of post roads of the United States is given under the act of Congress of 1866, to all telegraph companies accepting the provisions of that act. (Revised Statutes of the United States, sections 5263–5269.) The petitioner is one of the companies which has complied

with all the requirements of this act, and has secured its privileges. But, notwithstanding this, before the privilege can be exercised upon lands, the property of private persons or corporations, the consent of such persons must be obtained, or such proceedings must be had as will insure them just compensation. No act of Congress can give the right of taking private property for public purposes without first paying just compensation. (Constitution of the United States, V amendment.) And although section 8, of article 1, gives Congress power to establish post-roads and to make all laws which may be necessary to carry this power into effect, "like all other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by this instrument, among them that of the fifth amendment." (Monon Navigation Co. *vs.* The United States, 148 U. S., 325.)

The mode or method of exercising this right of eminent domain is fixed by the laws of the several States. Such mode or method is exclusive in its character in ascertaining the amount of the just compensation to be allowed. See Roberts *vs.* Northern Pacific R. R. Co, 158 U. S., 1; Sweet *vs.* Rechel, 159 U. S., 380. The Federal courts do not interfere with it, provided due process of law be furnished. Chicago *vs.* Chicago, 166 U. S.

This being the case, we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands or right of way—for the conduct of the procedure and for the steps by which the just compensation is reached. It is true that the purposes of the petitioner are greatly for the public benefit—that it is an important factor in interstate commerce, one of the agencies, and a most valuable agent, in interstate commerce, and that it is of most essential service to the citizen in time of peace, and to the Government in time of war. But the underlying proposition in our civilization, and in Anglo-Saxon liberty, is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property, against his will, for a public purpose, he is entitled to all the
34 safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain.

What, then, is the law of North Carolina on this subject as provided for telegraph companies?

Section 2010 provides that whenever no agreement, after application, can be obtained by the telegraph company for securing the right of way, it may, first giving security for costs, file its petition before the superior court of the county in which the lands are situate, or through which the easement, franchises, or privilege extends, setting forth and describing the lands, privileges or easement over which the right of way is claimed, and the owners thereof. And if the right of way is sought only over an easement or right of way, the party owning such easement need be the only defendant.

Section 2011 provides for the service of a copy of this petition with the proper notice to be served on the defendant.

These two sections bring the parties into court. The next section provides the steps to be taken after the parties are in court, and

important constitutional provision shall be observed—the
ment of the just compensation, without which the right
e exercised.

1 2012 declares: "The proceedings for the condemnation
or any easement or interest therein, for the use of tele-
mpanies; the appraisal of the lands or the interest therein;
of the commissioners of appraisal; the right of either party
ceptions; the report of commissioners; the mode and man-
peal; the power and authority of the court or judge; the
gment and the manner of its entry and enforcement, and the
f the company pending the appeal;" these ten distinct
steps in the proceedings, all leading to the final result and
d with that only, "shall be as prescribed in this chapter for
ing lands to the use of railroads."

hapter in the code here spoken of is chapter 49. The pro-
f this chapter with respect to the condemnation of lands
se of railroads are found in sections 1945 *et seq.*. Inasmuch
n 2010 sets forth all the necessary statements for the peti-
he telegraph company and section 2011 provides for its
nly so much of the railroad law as directs proceedings after
ion is before the court is made applicable to telegraph com-

, therefore, the petition is presented to the court, and the
nswers of defendants have been heard, with the proofs on
ch side, if the cause shown against the petition be insuffi-
ent the court shall grant an order naming three disin-
freeholders to act as commissioners of appraisal, and shall
ay for the first meeting of these commissioners.

1 1946 prescribes the duties and powers of the commission-
ue subpœnas, administer oaths, examine witnesses, view the
, adjourn and appraise the compensation, "and in deter-
he amount of such compensation they shall not make any
e or deduction on account of any real or supposed benefits
e parties in interest may derive from the construction of
posed railroad." The commissioners make their report
al, either party may file exceptions before the clerk and
eal. If appeal is taken, the company may, notwithstand-
r, take possession and hold the land by paying into court
nt of the assessment. Then provision is made for the
final judgment, for the power to enforce the judgment,
is taken to limit the title to the company only during its
e existence. These are all the provisions made for the con-
n of lands or of any easement, and of the duty of com-
rs, the right of exception, the report of commissioners, the
appeal, the authority of the court or judge, the final
t and its mode of enforcement, and the right of the company
appeal. Manifestly, it is all that is referred to in section
This disposes of two positions taken in argument. Section
horizes the court to make all orders necessary to carry out
t of the chapter where the mode and manner of conduct-
proceedings to the appraisal and proceedings consequent

thereon are not expressly provided. It is seen that these are minutely provided for. And this section has no application here.

It was also insisted that section 1952 provides for maps of the route to be made and filed in the office of the clerk of the court of the county through which the road may run. This provision applies to steps antecedent to the filing of the petition for condemnation, indicating the proposed route and allowing objections to be made so that it may be altered if necessary. It is not that part of the railroad law prescribed for telegraph companies, for it makes its own provision as to the filing the petition and the contents of the petition, and only adopts that part of the railroad law which prescribes the steps to be taken after the petition is in court. For the same reason, the section 1944 cannot be made to apply to telegraph companies. This section prescribes the formalities to be observed in filing a petition by a railroad company, and what the
36 contents of such petition must be. Among others, it requires the company to state that the company has surveyed the line or route of its proposed road and make a map thereof, and has filed it in the clerk's office, &c. But section 2010, which provides for the filing of a petition by a telegraph company and for its contents, makes no such or similar provision, and only calls in the aid of the sections relating to railroads for proceedings subsequent to the filing of the petition.

Such are the provisions of chapter 49 of the Code of North Carolina relating to the condemnation of a right of way for a telegraph company—when it becomes necessary to exercise the right of eminent domain.

The Code, section 2012 says that these proceedings on the part of the telegraph companies, and all subsequent steps therein, "shall be as prescribed in this chapter for condemning lands to the use of railroad companies." Chapter 49. The words are without qualification "as prescribed in this chapter." Therefore, they are to be found in the chapter alone. This was the manifest purpose of the act. Had the legislature intended that telegraph companies should always be bound by provisions of the law in this behalf as to railroad companies then or thereafter existing, it would have said so, either by adding the words, "or any amendment thereof hereafter adopted," or language equivalent thereto. The general rule unquestionably is, that when a statute refers to and adopts an existing law, its purport is confined to the law as it then exists, and does not embrace or include any subsequent modification of it. (Kendall *vs.* The United States, 12 Pet., 524; Shrew *vs.* Jones, 2 McLean, 78; United States *vs.* Knight, 3 Sumner, 368.) Standing upon this principal of law, the respondent says that since the passage of the Code, the legislature of North Carolina has amended the provisions in that instrument relating to the condemnation of land for railroad purposes in several important and vital particulars, and to that extent repealing provisions in the Code. That as to these provisions so repealed, they no longer exist, are as if they never existed. (Requin *vs.* The Inhabitants of Denton, 14 Eng. L. & Eng., 127; Curran *vs.* Owens, 15 W. Va., 224; Musgrove *vs.* V. &

., 50 Miss., 681; Insurance Co. *vs.* Ritchis, 5 Wall., 544; B. Co. *vs.* Grant, 8 Otto, 398.) Were the rule otherwise, the ld insert in the statute essential words which the legis- e to omit. (United States *vs.* Goldenburg, 168 U. S., 103.) dant contends therefore, that these amendments have d the provisions of the Code in this behalf, and they no ger have the meaning they had. That thus, there ex- no practicable method for securing the right of way for graph companies—and in effect no law is free of force thereto.

ngs up the vital question in this case, and necessitated an on into the effect and purpose of these amendments.

e passage of the Code, the legislature of North Carolina nded this chapter in the following particulars: §§ 1944,

1944 has been amended by striking out all requiring the the railroad company to state that the line or route of ed road has been surveyed and a map made, the road he location certified and filed with the clerk. Act of 93.

been seen, section 2010, addressed exclusively to tele- panies, states minutely the facts to be set forth in the y telegraph companies—and makes no requirement of a reference is made to any provisions of the Code as to rail- anies until sec. 2012 is reached, and that section relates proceedings and steps to be taken after the petition has and served and has become of record. This amend- e act of 1893, therefore, effects telegraph companies in no

same act, section 1952, is repealed. This section required o should be filed with the clerk, showing route and loca- e proposed road, before constructing it.

of this section another was passed requiring the railroad at the time of serving the summons, also to serve such a r the reasons stated above this amendment cannot affect companies. It relates to regulations required before the court.

islature in 1891 amended section 1946. This section is se expressly made applicable to telegraph companies in tant provision as to the duties of the commissioners in de- the amount of just compensation. As has been stated n used these words:

determining the amount of such compensation they shall any allowance or deduction on account of any real or sup- efits, which the parties in interest may derive from the on of the proposed railroad." Were this applied to a case resent, the commissioners, in determining the amount of ion to be awarded the railway company for the use of its ay, could make no allowance or deduction for any sup- ed or real benefit which the railway company might ive from the erection of the proposed telegraph line.

The act of 1891 struck this provision out entirely, adding,

however, this proviso: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to the land, then the said railroad company shall pay the costs of the proceeding, and shall not have judgment for the excess of benefits over the damages."

Applying these words to a case like the present, it would read: In case the benefits to the railroad company caused by the erection of the telegraph line be ascertained to exceed the damages to the said railroad company, then the telegraph company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.

Does this amendment render nugatory the provisions of the Code as to telegraph companies, and in effect wipe them from the statute book? That construction of statutes, indeed of all written documents, should be *ut res valeat non pereat*. And if any construction can be made to reach this result it must be adopted. Especially so in this case. The legislature, after experience of the statute passed in 1874–'75, re-enacted its provisions in 1883, and perpetuated an elaborate and careful method of securing to the people of the State and to the country at large the valuable services of telegraph companies. To strike these from the statute books would require overwhelming and unanswerable arguments. Under the circumstances it must be inquired How can just compensation be measured when lands or right of way are required for the use of telegraph companies? It may be done either by construing this provision of the Code in section 2012, as adopting in *ipsis simis verbis* the language of section 1946, and reading section 2012 as if the words were again repeated. In this case it could be said that mere implication could not repeal it, and so the damages could be assessed thereunder. Or it may be held that the commissioners could assess the damages as if the qualifying words were out, that is to say, following the instructions of the section immediately preceding the words afterward stricken out, "ascertain and determine the compensation which ought justly to be made by the telegraph company to the railroad company." And if necessary the court in this respect could direct and instruct them as to a just method. In the present case, looking at it as a practical matter, no difficulty could arise. The railroad company deny altogether that any benefit or advantage can
39 arise to it in the erection of the telegraph lines, and on the contrary aver that it is detrimental to it in the last degree. The commissioners would have before them no question of benefits, but one altogether as to damages.

It does not appear to the court that this amendment destroys the provisions of the code as to the condemnation of lands or rights of way for the use of the telegraph companies.

2. Has the telegraph company in this case followed the requirements of the code in these essential particulars?

The petition follows closely, almost literally, the language of section 2010, prescribing what facts should be stated.

3. Is the petition vague and indefinite in any respect?

It asks a right of way over the right of way of the railway

company—a well-defined and well-known subject—under whatsoever tenure it may be held, above all thoroughly known to the railway company. It distinctly specifies what part of the right of way is desired—so many feet from the outer edge of the right of way, or anywhere in which it would not obstruct or impede the use of its track. All subject to the provisions of section 2007, that the line be so constructed, and after construction be so maintained as not to obstruct or hinder the usual travel on the railway. This is a condition inherent in the use.

The cause has been heard, as it were, on general demurrer, at the least on demurrer going to the merits of the case. No facts are in dispute, and the question of law controls. No answer over is necessary.

The defendant, however, asks that pending these proceedings it be allowed to enter upon the erection of its poles and the construction of its lines.

The mode of exercising the right of eminent domain, a right claimed here under the laws of the State, is prescribed and fixed by the laws of the State. This court is bound by and must act within its provisions. These laws made no provision for the entry on the lands sought to be condemned until the damages are assessed and paid into court. It must be observed that we are dealing with a case in which the petitioner seeks the protection of the law and asks that he get rights in the mode and under the provisions of that law. He has not entered. He is not in possession. He seeks the right to enter and to take possession. Under these proceedings he cannot get these rights, except in the language of the act, section 1946. Defendant's second petition is dismissed.

Commissioners will be appointed under section 1945, who will proceed as in the code directed, making such compensation as shall be just.

CHARLES H. SIMONTON,
Circuit Judge.

9 Sept., 1898.

Endorsed: Filed in this office Sept. 14th, 1898. Sam'l L. Trogdon, clerk.

Petition for an Order Allowing Plaintiff to Give Bond and to Proceed to Construct Telegraph Line.

U. S. OF AMERICA, }
Western District of N. C. }

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO. }
vs.
THE SOUTHERN RAILWAY CO. }

To the Honorable Chas. H. Simonton, judge of the fourth U. S. circuit court district:

1. Your petitioner, The Postal Telegraph-Cable Co., humbly represents that it instituted condemnation proceedings in the superior court of Guilford county, State of N. C., against the defendant, Southern Railway Co., to condemn so much of the right of way of said railway Co. as may be necessary to construct, maintain and operate a line of telegraph thereon from the State line between the States of Virginia and North Carolina near Danville, Va., where said railway crosses said State line, to the city of Charlotte, in the said State of N. C., and from the city of Greensboro, in said State, to the city of Raleigh therein and from the said city of Greensboro to the city of Winston, in said State, on said right of way of said defendant railway Co. Said petitioner stipulated in said petition to construct said telegraph line near the outer edge of said right of way, or such other points thereon as may be agreed upon between it and said railway Co., and, petitioner stipulating, that in the event such said railway Co. should at any time, for any purposes, need the ground, or land, where the telegraph poles of petitioner may be erected, said telegraph Co. would remove them at its own expense, and that such telegraph lines should be so constructed as not
41 to interfere with said railway Co. in the operation of its trains, or the conduct of its business for which it holds said right of way.

2. That said cause was, upon the application of said defendant railway Co., removed to this honorable court on the -- day of ——, 1898, and since then no step has been taken to forward said condemnation proceedings.

3. That said petitioner is chartered under the laws of New York with the authority to construct, maintain and operate its said lines throughout the U. S. including the State of N. C., and has applied with the acts of Congress approved July 24th, 1866, Revised Statutes, 5263 to 5269, as will fully appear by the certificate of the Postmaster General shown to this honorable court, and is, therefore, authorized to construct its telegraph lines on all post-roads, and that said railway Co.'s right of way is, under the acts of Congress, a post-road, and that said telegraph Co. owns and operates connecting telegraph lines throughout the U. S. and Canada with connect-

ing cable lines across the Atlantic ocean, and that it already has and operates telegraph lines in the said State of N. C., and that the line now proposed to be constructed upon the right of way of said defendant railway Co. in said State will connect with its said lines heretofore constructed in said State, thereby making it a part of the great system of its lines extending throughout the U. S. as aforesaid, and that it is engaged in interstate commerce.

4. Petitioner avers that said railway Co. will not be damaged by the construction, maintenance of petitioner's telegraph line in the manner set out in the said petition, and that the said railway Co. is entitled to only nominal damages for the use of so much of its right of way for its purposes as prayed for in said petition. That nominal damages to said railway Co. will be just compensation for such use.

5. Petitioner avers that under the acts of Congress aforesaid it is entitled to the right, without obstruction, hindrance or delay, to construct its telegraph lines as prayed for in said petition. Wherefore, petitioner prays an order from this honorable court authorizing it to proceed at once, without delay to construct its said telegraph line, as prayed for in said petition, upon the execution of a bond to be approved by your honor or the clerk of this honorable court, as your honor may deem necessary to fully protect the right and interest of said railway Co., conditioned to pay such damages
42 to said defendant railway Co. as may be finally adjudged against it in said condemnation proceeding.

And, as in duty bound, will ever pray.

POSTAL TELEGRAPH-CABLE CO.,
By J. R. McINTOSH, *Agent & Att'y.*

UNITED STATES OF AMERICA, }
Western Dist. of N. C., Fourth Circuit. }

This day personally appeared the undersigned, clerk of said court, Joseph W. Kates, general superintendent of the Postal-Telegraph Cable Co., who being by me duly sworn, says the facts stated in the foregoing petition, of his own knowledge, are true, and those stated upon information and belief he believes to be true.

JOS. W. KATES, *Gen'l Supt.*

Sworn to and subscribed before me this, the 18th day of August, 1898.

C. B. MOORE, *Clerk.*

Fee paid.

Endorsed: Filed in this office Sep. 14, 1898. Sam'l L. Trogdon, clerk.

Order Authorizing Clerk to Appoint Comm'rs.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
SOUTHERN RAILWAY CO.

It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal-Telegraph Cable Company, as proposed in the petition of said company to this court.

That the said commissioners shall take before the said clerk
43 the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises. The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived of the telegraph Co., or the value thereof, to wit: The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, the said commissioners shall reduce their award to writing and sign and seal the same and file it with the said clerk of this court at Greensboro.

CHARLES H. SIMONTON,
Circuit Judge.

15th of Sept., 1898.

Endorsed: Filed in this office Sep. 17, 1898. Sam'l L. Trogdon, clerk.

Notice Appointing Comm'rs and Calling Meeting on September 30th, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY COMPANY.

To Alfred M. Scales, John M. Walker, and J. Addison Hodgin:

Pursuant to an order made by his honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to summon three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by the reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court-room of the U. S. circuit court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock a. m., and therein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Service of Notice Accepted.

We do hereby accept service of the within summons. This 19th day of Sept., 1898.

J. M. WALKER.
A. M. SCALES.
JAS. A. HODGIN.

Endorsed: Filed in this office Sept. 19th, 1898. Sam'l L. Trogdon, clerk.

Notice of Appointment and Meeting of Commissioners on September 30th, 1898.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY CO.

The defendant, The Southern Railway Co., hereby take notice:

That pursuant to an order made by his honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to appoint and summons three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of Guilford county, N. C., upon whom service of summons has this day been had, requiring them to appear and sit upon the hearing of said cause in the court-room of the U. S. circuit court in Greensboro. N. C., on September 30th, 1898, at 10 o'clock a. m. Of such proceedings you will take notice and be governed accordingly.

Done this 19th day of September, 1898, as witness my hand and seal of this court.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

Executed the within notice Sept. 19th, 1898, at Greensboro, by reading and delivering to W. E. Coffin, agent of the Southern Railway Company, a copy of this notice.

J. M. MILLIKAN,
U. S. Marshal,
Per J. A. LOGAN, *O. D. M.*

Endorsed: Filed in this office Sept. 21, 1898. Sam'l L. Trogdon, clerk.

Defendant's Bill of Exceptions No. 2.

L TELEGRAPH-CABLE COMPANY *vs.* ÜTHERN RAILWAY COMPANY. } Defendant's Bill of Exceptions No. 2.

t further remembered that on the 15th day of September, no proceedings having intervened since the proceedings set the first bill of exceptions), the court made an order directing el L. Trogdon, clerk of this court at Greensboro, to appoint commissioners to assess the damages which the Southern Rail- Company may sustain by reason of the erection of a telegraph y the Postal Telegraph-Cable Company upon the property of id railway company, as proposed in the petition of said com- filed in this cause, the powers, duties, and proceedings of said commissioners being fixed in said order, which order is in the words and figures following to wit: (Here insert order, see order on page 42 of this record); to which action, ruling, rder of the court said Southern Railway Company by coun- cepted upon the same grounds as are set forth in a paper filed 31st day of August, 1898, stating the grounds of the defend- notion to dismiss the plaintiff's petitions, and which paper is et forth in defendant's first bill of exceptions, to which refer- s hereby specially made; and upon the further grounds that rder of the 15th day of September, 1898, was prematurely d, without proper notice to said defendant, and that neither rder nor the powers, duties, and proceedings of said commis- s, as in the proceedings therein set forth, are authorized by

, pursuant to said last-mentioned order of the 15th day of nber, 1898 (no other proceedings having intervened), the said l L. Trogdon, clerk, on the 19th day of September, 1898, did tten notice or order of that date, appoint said commissioners mmon them to appear and sit upon the hearing of the cause, aid notice or order of September 19th, 1898, set forth, which or order is in the words and figures following, to wit: (Here notice or order appointing commissioners, see notice or order e 43 of this record.) And upon the same day, to wit, the ay of September, 1898 (no other proceedings having inter- the said Samuel L. Trogdon, clerk, issued a notice and served ne upon the parties to this cause, warning the said parties e had appointed said commissioners, and also appointed a nd place for them to sit upon the hearing of this cause, and ng said parties to take notice and be governed accordingly, last-mentioned notice is in the words and figures follow- wit: (Here insert notice to parties, see notice on page 44 of this , to all of which action of Samuel L. Trogdon, clerk, both in g and issuing the notice or order appointing commissioners, o in entering, issuing, and serving the notice to said parties cause, the said Southern Railway Company by counsel ex-

cepted upon the grounds hereinabove set forth, and prayed that this its second bill of exceptions be signed, sealed, enrolled, and made a part of the record in this case, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4th November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

47 *Order for Plaintiff to Show Cause on Oct. 7th, and Suspending Proceedings by Commissioners.*

In the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, Fourth Circuit.

POSTAL TELEGRAPH-CABLE COMPANY
against
SOUTHERN RAILWAY COMPANY.

Proceedings for condemnation of right of way.

Order.

This day comes the defendant, Southern Railway Company, and moves for leave to file its answer to the petition filed by the plaintiff herein, as allowed by the provisions of chapter 49 of the Code of North Carolina, and under the law and practice, and also to vacate the order recited below last entered herein:

Upon consideration whereof, the court doth order that the plaintiff, Postal Telegraph-Cable Co., be required to show cause before me, at Charleston, U. S. court-room, on 7 October next, at 10 a. m., why the defendant shall not have leave to file its answer as prayed, and the former order be vacated and annulled.

And in the meantime it ordered that the said order, which authorized the clerk to appoint commissioners to ascertain and determine the compensation which ought to be made to defendant for the condemnation of its right of way, &c., be suspended, and all action or proceedings thereunder by the plaintiff and the commissioners, be likewise stayed, until the further order of this court.

A copy of this order shall be served upon A. L. Brooks, of counsel for petitioner, or, if he cannot be found, upon an agent of the plaintiff.

CHARLES H. SIMONTON,
Circuit Judge.

23 Sept., 1898.

A true copy.
Teste:
[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

uted Sep. 26, 1898, by delivering a copy of the within order . Brooks, agent or attorney of Postal Telegraph-Cable Co., at boro, N. C.

J. M. MILLIKAN,
U. S. Marshal,
Per T. E. McCRARY,
Chief Office, D. M.

orsed: Filed in this office Sep. 27, 1898. Sam'l L. Trogdon,

Answer of Defendant.

Circuit Court of the United States for the Western District of North Carolina, at Greensboro, Fourth Circuit.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

defendant, The Southern Railway Company, saving and re- the many grounds of objection to the proceeding of the inant and to both its petitions therein filed, for answer to the n filed in the superior court of Guilford county, North Caro- nd removed to this court, or to so much of said petition as dvised it is material for him to answer, says:

hat as to the allegations in said petition contained, with re- o the charter and incorporation of the petitioner and its authority to construct, maintain and operate telegraph lines hout the State of New York and other States of the United of America, including the State of North Carolina, as claimed out in said petition, defendant says it has no knowledge or ation sufficient to form a basis of belief, and therefore neither nor denies the said allegations, but calls for strict proof of ne.

hat, as to the effort and the failure of petitioner to secure by t or agreement the right to erect its telegraph lines upon the f way of aforesaid and for the purpose of the aforesaid "de- t railway company," as alleged in said petition, and required by the statute law of North Carolina, defendant neither ad- mits nor denies, but calls for strict proof of said allegations, and of compliance with said statute law in this regard.

hat as to the telegraph lines which the petitioning telegraph ny has already constructed, and others to be constructed, and operated by said company, and the future connections, ese lines, of its present proposed lines, if constructed as pro- nd asked in its said petitions—defendant has no knowledge, erefore neither admits nor denies the allegations of said peti- this regard, but calls for strict proof of the same—if and in s the court may deem said allegations to be relevant.

4. That as to the entire claim of the petitioning telegraph company, to condemn a right of way for its purposes, upon the property of defendant, this defendant denies that there is any law, either common or statute, existing in the State of North Carolina today, which authorizes such condemnation.

5. Defendant further and in particular denies that any such condemnation is authorized by "chapter 49 of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof," as claimed in the said petition.

Copy.

Eminent Domain Legislation of North Carolina.

Section 2012 of the Code of North Carolina of 1883 is as follows:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the *the* duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

This section, excluding the heading, may be abstracted as follows:

"The proceedings for the condemnation of lands, or any
50 easement or interest therein, for the use of telegraph companies, * * * shall be as prescribed in this chapter for condemning lands to the use of railroads."

The sections of the said Code of 1883 thus referred to by section 2012, so far as relevant to the defendant's present purpose, are as follows, viz:

Section 1944 of Code.

The first paragraph of section 1944 is as follows, the balance being, for the purpose in hand, unimportant:

"SECTION 1944. Petition presented; character or; names and places of residence to be given; copy of petition must be sent to superior court. 1871–'2, c. 138, s. 14.

"For the purpose of acquiring such title the said company, or the owner of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal to the superior court of the county in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court; and, if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state

ompany is duly incorporated, and that it is the intention
ipany in good faith to construct and finish a railroad from
places named for that purpose in its articles of associa-
its charter; that the whole capital stock of the company
n good faith subscribed, as required by this chapter, or by
of its charter; that the company has surveyed the line or
s proposed road, and made a map or survey thereof, by
h route or line is designated, and that they have located
road according to such survey, and filed such certificates
cation, signed by a majority of the directors of the com-
he clerk's office of the several counties through or into
said road is to be constructed; that the land described
ition is required for the purpose of constructing or oper-
proposed road; and that the company has not been able
title thereto, and the reason of such inability. The pe-
ether filed by the company or the owner of the land, must
the names and places of residence of the parties, so far as
can by reasonable diligence be ascertained, who own or
laim to own or have, estates or interests in the said real
d if any such persons are infants, their ages, or as near as
ust be stated; and if any such persons are idiots or persons
unsound mind or are unknown, that fact must be stated,
ether with such other allegations and statements of liens
incumbrances on said real estate as the company or the
y see fit to make. A copy of such petition, with a notice
e and place when and where the same shall be heard by
or court, must be served on all persons whose interests are
cted by the proceedings, at least ten days prior to the
f the same by the said court."

Section 1945 of Code.

s Made Against Petition; Freeholders Appointed to Appraise Estate. 1871–'72, *c.* 138, *s.* 15.

enting such petition to the superior court, as aforesaid,
f of service of a copy thereof, and notice as aforesaid, all or
e persons whose estates or interests are to be affected by
dings may answer such petition and show cause against
he prayer of the same, and may disprove any of the facts
it. The court shall hear the proofs and allegations of
s, and, if no sufficient cause is shown against granting the
the petition, it shall make an order for the appointment
isinterested and competent freeholders, who reside in the
ere the premises are to be appraised for the purposes of
ny, and shall fix the time and place for the first meeting
missioners.

Section 1946 of Code.

1946 is as follows:
946. Commissioners to be qualified to issue subpœnas,

administer oaths, to adjourn, to appraise and report under hands and seals; either side may file exceptions before clerk; may appeal; upon payment of sum appraised, company to enter and take possession during appeal; final judgment; court to have power to enforce judgment; land to belong to company during its corporate existence; possession of land not condemned to be surrendered to owner, &c.; costs at the discretion of judge or court. 1871-'72, c. 138, §§ 16, 17, 18.

"The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses,
52 and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days' notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly be made by the company to the party or parties owning or interested in the real estate appraised by them; and in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad. They shall report the same to the court under their hands and seals, and within twenty days after filing the same any person interested in the said land may file exceptions to said report, and, upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge, on the hearing, may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then, and in that event, the said company may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeals, and until the final judgment rendered on said appeal or appeals. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the company, and upon the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then, and in that event, all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company aforesaid. A certified copy of said judgment, under seal of the court, shall be registered in the

ere the land is situate, and a copy of the same, or
il certified, may be given in evidence in all actions
proceedings, as deeds for land are now allowed to be
in evidence. All real estate acquired by any company
er and pursuant to the provisions of this chapter, for the
its incorporation, shall be deemed to be acquired for the
But if the court shall refuse to condemn the land, or
thereof, to the use of said company, then, and in that
money paid into court, or so much thereof as shall be
shall be refunded to said company. And the company
no right to hold said land not condemned, but shall sur-
possession of the same on demand, to the owner or
his or their agent or attorney. And the court or judge
full power and authority to make such orders, judgments
and issue such executions and other process as may be
o carry into effect the final judgment rendered in such
s. The costs in this proceeding shall be paid by either
ne judge or court in its discretion shall adjudge. The
ners shall each be entitled to three dollars per day for
ney are engaged in the performance of their duties, and
nall be taxed in the bill of costs."

Section 1952 of Code.

952 is as follows:

s 1952. Maps of route to be made; notice given to occu-
nd; superior court petitioned when route is objectionable;
n of route allowable, unless, &c.; time of certificate; com-
1871–'2, c. 138, § 24.

company, before constructing any part of their road into
any county named in their articles of association or
ll make a map and profile of the route intended to be
such company in such county, which shall be certified
sident and engineer of the company, or a majority of the
nd filed in the office of the clerk of each county through
road is to be made. The company shall give a written
l actual occupants of the land over which the route of
so designated and which has not been purchased by, or
ne company, of the route so designated. Any party feel-
ved by the proposed location may, within fifteen days
ing notice as aforesaid, apply to the superior court by
ly verified, setting forth his objections to the route desig-
the said court may, if it considers sufficient cause there-
appoint three disinterested persons, one of whom must
practical engineer, commissioners to examine the pro-
d route, and after hearing the parties, to affirm or alter
same as may be consistent with the just rights of all
the public, but no alteration of the route shall be made
the concurrence of the commissioner who is a practical
neer. The determination of the commissioners shall,
rty days after their appointment, be made and certified
nd their certificate filed in the office of the county clerk.

Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment, and, if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount to — paid."

Sections 1944, 1946 and 1952 have been amended or changed by the following acts:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages of said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

Chapter 396, Acts 1893.

"An act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

"The General Assembly of North Carolina do enact:

"SEC. 1. That section one thousand nine hundred and forty-four of chapter forty-nine of the Code be amended by striking out in said section all from the word 'charter' in line sixteen of said section down to and including the word 'constructed' in line twenty-four thereof.

55 "SEC. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purposes of a railroad that at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located.

"SEC. 3. That section one thousand nine hundred and fifty-three of chapter forty-nine of the Code be amended by striking out from the word 'thereby' in line four down to and including the word 'change' in line seven of said section.

"SEC. 4. That this act shall not affect any pending litigation.

"SEC. 5. That this act shall be in force from and after its ratification.

"Ratified the 6th day of March, A. D. 1893."

Language Stricken from Section 1944 *by Act of* 1893.

In other words, the legislature amended and changed section 1944 by striking out the following words, viz:

"That the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

Language Stricken from Section 1946 *by Act of* 1891.

And the legislature amended and changed section 1946 by striking out the following words, with a single saving clause—the proviso being now given in italics, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

56 "*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

Section 1952 was repealed, and the second section of chapter 369, Acts of 1893, copied above, substituted in lieu thereof.

Sections 1944, 1946 and 1952, of the Code of North Carolina, appeared in chapter 49, as above printed at full length, when section 2012, of chapter 49, provided that:

Upon the above view of chapter 49 of the Code of North Carolina of 1883, and the amendments thereof, defendant is advised:

First. That section 2012 neither referred to nor adopted any of said amendments, and therefore the petitioning telegraph company's proceeding is not authorized by nor based upon said amendments, and

Second. That chapter 49 of the Code, or, at least, the substantive sections and features of the law as it stood in the Code of 1883 has been repealed, or, at least, so radically changed and altered by said amendments that said original sections of chapter 49 no longer furnished legal basis or authority for the petitioning telegraph company's proceeding.

Indeed, defendant is advised and submits that said amendments amount to a legal prohibition against a condemnation proceeding by a telegraph company under and pursuant to the original sec-

tions of chapter 49 of the Code as they stood prior to said amendments.

6. The petitioning telegraph company seeks, in one proceeding, to condemn a right of way for its purposes upon the property of this defendant, for a distance of over two hundred miles and extending through many counties; which mode of procedure, as defendant is advised and believes, is based upon sec. 2010 of the Code of North Carolina of 1883, and especially upon the last five lines of said section, which provides as follows: "And if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends."

57 The allegations of the said petition in this regard are as follows, to wit:

"Your petitioner * * * desires to construct, maintain and operate a line of telegraph, along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, the whole distance being about 193 miles."

This defendant denies that the above allegation, either taken alone or in connection with any other allegation in the said petition, amounts to a distinct and legally sufficient statement of what is required in sec. 2010 above referred to, as to the character of defendant's property, in order to give the court jurisdiction in one proceeding to condemn defendant's property in all the counties mentioned; and, if the court shall be of opinion that said allegation, either taken alone or in connection with any other allegation in said petition, is legally sufficient and adequate to the purpose aforesaid, then this defendant takes issue in fact with said allegation or allegations of said petition, and states that a large portion of the lands of this defendant along and upon which the petitioning telegraph company seeks to condemn the right of way for its purposes in the various counties specified in its said petition, is held by this defendant in fee-simple—the said land having been acquired by purchase from the original owners under deeds conveying to this defendant fee-simple title to the same,—a title as complete and absolute as that of any citizen who has purchased land and taken a deed for the same in fee-simple.

This defendant is advised and submits that neither sec. 2010, above referred to, nor any other section of this, or any other statute of the State of North Carolina, contains any warrant for condemning in one proceeding, lands of a railroad company in several counties, held by said railroad company by fee-simple title.

7. The complainant's petition states that "said poles will be so

erected and said telegraph line so constructed and maintained, as not to obstruct the usual travel and business of said railroad
58 company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way;" but this defendant denies the truth of said statement, and declares that said poles erected and said telegraph line constructed and maintained, as set out in detail in said petition, will obstruct and hinder the usual travel and business of this defendant, and will interfere with the operation of this defendant's railroad company, and with the telegraph line now constructed upon this defendant's property; and this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon its property, as set out in said petition, in such a manner as not to obstruct or hinder the usual travel upon defendant's said railroad.

—. Further answering, this defendant says that neither the Code of North Carolina of 1883, nor any amendment thereof, contemplates or authorizes the condemnation by a telegraph company for its purposes of such an indefinite, uncertain, changing, wobbling right of way as is described and sought to be condemned by the petitioning telegraph company in its said petition, and that such a proceeding and such a right of way wholly violates that clearness, accuracy, and certainty as to metes, bounds, location, uses, and the like contemplated by said statute law of North Carolina.

9. Defendant, further answering, says that said statute law of North Carolina does not contemplate or authorize the condemnation by a telegraph company for its purposes of a right of way based, as set out in said petitioning telegraph company's petition, partly upon condemnation and partly upon contract; and said defendant further denies that said petition describes and asks the condemnation of such a right of way as said statute law of North Carolina does authorize and contemplate; if indeed it can be held to authorize any condemnation whatever of the property of a railroad company by a telegraph company—which this defendant denies.

10. Further answering, this defendant says, that so emphatic has the law of North Carolina ever been with regard to the above-mentioned requisites, the definiteness and certainty, and notice as to the precise location, metes, bounds and descriptions of the right of way which it authorized to be condemned, that three times over it has embodied a distinct requirement of a map or chart of such right of way, and however said statute has been amended as to the details of said requirement, it has been rather strengthened
59 than weakened throughout said successive amendments; that section 1952, above quoted, opens with the following sentence:

"Every company, before constructing any part of their road into or through any county named in their articles of association or charter, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the

directors, and filed in the office of the clerk of each county through which the road is to be made."

That section 1944, above quoted, requires that the petition presented to court for the purpose of acquiring title to a right of way for the purposes of the petitioning company shall state:

"That the company has surveyed the line or route of the proposed road and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

And, while section 1952 has been repealed and section 1944 amended by striking out the language quoted, yet the act of 1893, chapter 396, which enacted such striking out and such repeal, substituted in the place of the said section, and the said language thus stricken from the statute book, the following yet stronger provision:

"That whenever it shall become necessary to condemn any land for the purposes of a railroad that, at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land sought to be condemned, and at what points on such land such cuts and embankments are located."

This defendant is advised that these requirements of maps, surveys, locations, etc., are indispensable, indeed, jurisdictional, requirements, and have been held to be such by the supreme court of North Carolina; and yet——

No map was served upon this defendant, the railroad company, with the petition of the telegraph company; no survey of its proposed route has been made by the telegraph company; no map upon which such route is designated has been made; no location of such route has been made, and no certificates of location have been signed by a majority of the directors of the telegraph Co. and
60 filed in the clerk's offices of the counties through which it is proposed to extend such route. In a word, this defendant is advised and submits that the entire proceeding of the petitioning telegraph Co. thus far has been without warrant of law and in the teeth of the most vital and emphatic requirements of the statute law of North Carolina.

The above requirements would seem to be of the very spirit and essence of the statute; and, if it be suggested that they are inapplicable to telegraph companies in their present form, this defendant is advised that such a suggestion is but another indication of the soundness of the position for which it contends, to wit: that the North Carolina railroad law of eminent domain is incapable of being applied to the case of telegraph companies without being recast and adopted to that purpose by the legislative hand.

11. Further answering, defendant denies "that the right of way"

this defendant is "about 100 feet wide, and it extends about 50 et from a line along the centre between the rails of said main ack;" on the contrary, defendant states that the strip of land ong which its tracks are laid and its trains are run varies greatly width at different points along its line, and that at sundry oints along said line included in and covered by the condemnation roceedings of the plaintiff is much less than 100 feet in width, ndeed, is so narrow that to erect a telegraph line thereupon in the anner set out in said petition would be impracticable, or, at least ould grossly imperil the safe operation of defendant's railroad and rossly obstruct or hinder the usual travel thereupon.

12. Said petitioning company's petition makes the following tatement: "The said defendant railroad company is duly incor- orated, doing business by virtue of its charter with a right of way f 100 feet in width, obtained by enactments of the General Assembly f this State for railroad purposes alone."

Defendant submits that said allegation is indefinite, uncertain nd obscure. As to the statement that the right of way of this de- endant is 100 feet in width, defendant repeats the denial and the tatement just above made in answer to a similar allegation in said etition. If said allegation means, or is intended to convey the eaning, that the charter of this defendant was obtained by enact- ents of the General Assembly of North Carolina, then defendant enies the truth of this statement, and states that, on the contrary, s said charter was obtained by enactment of the General Assembly of the State of Virginia. But, if said allegation means, or is 1 intended to convey the meaning, that "the right of way" of this defendant was obtained by enactments of the General As- embly of the State of North Carolina, this defendant denies the ruth of this statement also, inasmuch, as above set forth, much of he property of this defendant and of the strip of land upon which s tracks are laid and its trains are run, throughout the several ounties specified in said petition of the telegraph company, is held y this defendant by fee-simple title, derived under deeds of pur- hase from the original owners of said land.

12. Said petition of the telegraph company contains the follow- ng allegations: "Said telegraph lines when constructed will in no ay damage the property of said railroad company, nor impair nor iminish the value of said right of way for railroad purposes, but hat the same will be beneficial to said railroad Co., and its atrons." Defendant is advised that said allegation is rather a con- lusion of law than a statement of fact; but, whichever it may be, efendant meets said allegation with a denial of its truth as a state- ent of facts and of its soundness as a conclusion of law. And, in rther answering the said allegation, which defendant is advised s put forward as a basis upon which to claim or to argue that noth- ng more than "nominal damages" should be allowed to this efendant, as compensation to it for the condemnation of its prop- rty by the petitioning telegraph Co., for its purposes—this defend- nt says that, not only would "nominal damages" not be to this efendant that "just compensation," which the supreme law of the

land guarantees to the citizen when his property is taken for public use, but, such "just compensation" for such condemnation of the property of this defendant as is contemplated and sought in the said petition of the plaintiff, would amount to a very large sum of money—a sum much larger, indeed almost incalculably larger, than the jurisdictional limit of this court; indeed, defendant states that the damages to its property from the condemnation sought in said petition of the telegraph Co., would amount not less to a sum of $300 per mile of such right of way, or an aggregate for the entire 200 miles of not less than ($60,000) sixty thousand dollars.

The law of North Carolina, as at present it stands amended, contemplates the estimation of three elements in arriving at "just compensation" for the taking of the property of the citizen for public use, to wit: the loss and damage to the defendant resulting from the taking; the benefits to defendant's land resulting from
62 the construction of the proposed railroad, and the benefits to the complainant resulting from the same source. This will more clearly appear from the following review of the legislation upon the subject. The phraseology of sec. 1946, prior to its amendment, was as follows:

"In determining the amount of such compensation, they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

These words clearly mean that the amount the citizen is to receive by way of compensation for his property, taken for public use, is to be measured by the extent to which his property is damaged by such "taking;" and they further mean that there is not to be offset against such "damages," any real or supposed "benefits" which may accrue to the property of the citizen from the construction of the proposed railroad or other improvement.

The amendment introduced by the law of 1891, consisted in "striking out" and repealing the clause above quoted, and inserting the following proviso:

"Provided, however, that if in any case the benefits to the land, caused by the construction of said railroad, be ascertained to exceed the damages to the said land, then said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

The sole advantage resulting to the citizen from this proviso is the assurance that the condemning company shall not have a judgment against him for the excess of the benefits over the damages. He has lost, however, the protection afforded him by the law, as it originally stood in section 1946 of the Code—which authorized him to prove the entire amount of his "damages," without the same being offset or reduced by any real or supposed "benefits" estimated to have accrued to his property by the public improvement to be constructed upon it.

This compensation clause, as it originally stood in section 1946 of the Code, forbade the commissioners to make "allowance or deduction on account of any real or supposed benefits which the

es in interest may derive from the construction of the proposed
ad."

e calculation was then a very simple one, embodying but a
e element, to wit: the "damage" to the land of citizen result-
rom the "taking" of it, or a part of it, for public use.

When, however, the General Assembly struck this clause of prohibition from the statutes, the two elements above mentioned, to wit: the "benefits" to the defendant resulting the construction of the proposed railroad, and the "benefits" e complainant resulting from the same source (which had been ided), again took their natural place and effect as elements erly and necessarily entering into the estimation and calcula- of "just compensation" to the citizen. Under the act of 1891, e copied as "chapter 160, Acts of 1891," the railroad must be as compensation what the privilege is worth to the telegraph hat is, for the benefits which may be estimated to accrue to elegraph Co., therefrom.

the law of '83—when a railroad takes the property of a citizen ts purposes, and the question of "just compensation" arises, a single element is or can be considered, and that is the extent ich the defendant's property is damaged by the "taking;" and "damages" can neither be reduced by offsetting against them benefits" estimated to accrue to the defendant's property from onstruction of the proposed improvement, nor increased by g to them the amount of the "benefits" estimated to accrue e condemning company from the same cause. But in the law , the General Assembly has completely changed its mind and sition, and determined that all these elements ought to be, and be considered: and this defendant is advised that such is un- bly the law of North Carolina today, as regards compensation e citizen, when a railroad takes his property. But defendant ther advised that the amendment of 1891, which introduced tate of the law, has no application to a telegraph company, , if allowed to condemn at all, is allowed or required to pay a pensation" estimated by the very different measure of the of '83.

fendant is, however, yet further advised, infers and respectfully its, that the legislature never intended to authorize or to re- a condemning railroad company to apply and to pay one ure of compensation and a condemning telegraph company a lly different one; from which conflict and contrariety in the his defendant is yet further advised, infers and respectfully its that:

t there is no law existing on the statute book of North Carolina by which a telegraph company is authorized to condemn either a ad right of way or the fee-simple lands of a railroad company.

erefore, defendant asks that it be adjudged that the plaintiff is not entitled to the relief demanded in the petition, nor to any judgment against the defendant, and that the defendant

may be adjudged to have such other and further relief as it may be entitled to, and to recover its costs, &c.

STILES & HOLLADAY AND
F. H. BUSBEE,
Solicitors & Counsel for Def't.

IN THE U. S. CIRCUIT COURT, }
At Asheville, N. C., } *ss:*

C. H. Hudson, being duly sworn, saith that he is the chief engineer of the defendant, Southern Railway Company; that the foregoing answer is true, except where the allegations are made upon information and belief, and as to those he believes to be true.

C. H. HUDSON.

Subscribed and sworn to before me this the 31 August, 1898.
C. B. MOORE, *Clerk.*

Endorsed: Filed in this office Octo. 12, 1898. Sam'l L. Trogdon, clerk.

Demurrer to Defendant's Answer.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit.

POSTAL TELEGRAPH-CABLE COMPANY }
vs.
SOUTHERN RAILWAY COMPANY. }

To the Honorable Chas. H. Simonton, circuit judge:

Said Postal Telegraph-Cable Company, by its attorney, in obedience to an order made and entered by this honorable court at chambers on the 23rd day of September, 1898, to show cause on this day why the defendant railway company shall not have leave to file its answer as prayed, and the former order authorizing the appointment of commissioners to assess the damages to which the said defendant railway company may be entitled against the said telegraph company for the right to construct, maintain and operate its telegraph lines over the right of way of the said defendant railway company, as prayed for in its petition filed in the superior court of Guilford county, and removed upon application of the said
65 defendant railway company to this court; beg leave most respectfully to state that this honorable court proceeding in this matter under and according to the statute laws of the State of North Carolina, in such cases made and provided, did heretofore at chambers, in the city of Asheville, in said State of North Carolina, on the — day of ——, 1898, hear a demurrer filed by the said defendant railway company to the petition of the said telegraph company, and afterwards on the 9th day of September, 1898, your honor, in rendering an opinion upon the said matter, carefully reviewed the many grounds of demurrer assigned by the said railway company to the proceeding on the part of said telegraph company, and

and overruled the same. Your honor using in said opinion
owing language:
he petition vague and indefinite in any respect? It asks a
way over the right of way of the railway company—a well-
and well-known subject—under whatever tenure it may be
ove all thoroughly known to the railway company. It dis-
specifies what part of the right of way is desired—so many
m the outer edge of the right of way, or anywhere in which
d not obstruct or impede the use of its track. All subject to
visions of section 2007, that the line be so constructed, and
nstruction be so maintained as not to obstruct or hinder the
ravel on the railway. This is a condition inherent in the

e cause has been heard as it were on general demurrer, at
demurrer going to the merits of the case. No facts are in
, and the question of law controls. No answer over is neces-

eason of that adjudication, your respondent says the said de-
t railway company should not have leave to file any answer
stage of the proceeding, and the former order should not be
l and annulled.
respondent respectfully insists that under the laws of North
a it has the right to maintain these proceedings, that under
ws, there are three conditions only necessary to authorize the
n the part of a telegraph company, namely:
. That it is incorporated.
d. That no agreement on application could be obtained by
graph company for the securing of said right of way.
d. That it has given security for cost.
And respondent says that each and every one of those
matters were distinctly set forth by averment in its petition
filed in the said superior court of Guilford county, and were,
re, admitted to be true by the demurrer of the said defendant
company to the same.
ises considered, respondent, therefore, says that the only pur-
at an answer would serve would be to longer postpone and
he petitioner in securing the rights accorded to it by the
laws of North Carolina; and that every matter of defense
ore set up by the said defendant railway company to the
of the said telegraph company is now *res adjudicata*, and it
be trifling with the dignity and intelligence of this court to
present them for further consideration.
ectfully submitted.

J. R. McINTOSH &
A. L. BROOKS,
Att'ys for Telegraph-Cable Co.

orsed: Filed in this office Oct. 12, 1898. Sam'l L. Trogdon,

Opinion Sustaining Demurrer to Answer.

In the Circuit Court of the United States for the Western District of North Carolina. In the Circuit Court, Fourth Circuit. In Equity.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

The defendant, at the hearing of this case on petition at Asheville, interposed a demurrer to dismiss the complaint, because the facts stated therein disclosed no cause of action. The demurrer was overruled, and an order was made providing for the appointment of commissioners. At a later date, defendants came in and asked leave to answer, and to this end the order be vacated.

The order passed upon overruling the demurrer was based upon a construction of the code of North Carolina of 1883, which left in the discretion of the court the privilege of answering over. This, however, is not in accordance with the law of North Carolina. "After the decision of a demurrer, the judge shall, if it shall appear that the demurrer was interposed in good faith, allow
67 the party to plead over upon such terms as may be just (Code, section 272). There can be no doubt as to the good faith of the demurrer. This section has been construed to give the defendant the right to answer over, upon overruling the demurrer. (Moore *vs.* Hobbs, 77 No. Ca., 65; Brownson *vs.* Insurance Co., 85 No. Ca., 411.) In this last case it was held that it was not proper to interpose the condition that the costs be paid.

In Morris *vs.* Gentry, 89 No. Ca., 249, this right to answer over was sustained, even after demurrer overruled in the supreme court.

The order for the commissioners is vacated, and leave is given to defendant to answer over.

Exercising this right the defendant has answered.

The answer, after setting up very many grounds of defence heretofore passed upon, and therefore now overruled, adds another. It avers that very many sections of the land over which the road runs, and which the petitioner seeks to condemn, are owned in fee-simple by the defendant. That thus the petitioner does not seek to condemn a right of way upon an easement only, but it also seeks to condemn the land of defendant. This being so, condemnation proceedings must be had in the county to which the land lies, Code of No. Ca., sec. 1944. The provision of the code which authorizes proceedings in one county, only, applying only to the condemnation of the easement.

The language to be construed is in section 2010 of the Code, and in the proviso. It is in these words:

"Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement, or right of way which extends into or through more counties than one, the whole

ontroversy may be heard and determined in one county
ough which such easement or right of way extends."
tioner demurs to the answer and the question of con-
ust be met.

meant by the words "easement or right of way"? Are
right of way" synonimous with—the alternative of the
ment" or do they mean two different things?

lly and strictly, a way is the passage over the lands of
ight of way is the right to use this passage. Williams
Union R'y Co., 50 Wis., 71; 21 Am. & Eng. Ency. of

tion taken by the defendant is very nice and ingenious.
create conviction of its soundness. Yet it is most diffi-
to answer.

opularly speaking the right of way of a railroad com-
, that which is understood when the term is used, is the
hat part of the land on each side of it used and possessed
pose of passing through the country from one point to
Anderson, in his Law Dictionary, says: "By right of
erally meant a private way which is an incorporeal here-
f that class of easements in which a particular person
on of persons has an interest and a right, though another
e owner of the fee in the land in which it is claimed.
ge which one person or description of persons may have
over the land of another in some particular line.
ng to a railway, a right of way is a mere easement in the
hers, obtained by lawful condemnation to the public use
ase. It is a way over which the company has to pass
ration of its trains. The term includes land acquired
y side tracks and turnouts and the improvements thereon.
s refers to the mere intangible right of crossing. Often
which the company appropriates for its use and upon
ilds its road-bed." Keener *vs.* Union Pac. R'y, 31 Fed.

another view of this question. The rule in the construc-
utes is to give to every word force and effect. Applying
re, we would not, unless forced to do so, conclude that
mean the same thing, convey the same idea. The word
ould have fully conveyed the idea of an incorporeal
t as distinguished from the fee in the land and the use
ds "or right of way" would not only be tautological,
ng.

itself uses these words in such a way as to induce the
that they do not convey the same idea. In section 150
railroad, plank road, turnpike or canal company shall
or presumed to have conveyed any real estate, right of
ent, leasehold or other interest in the soil which may
ondemned or otherwise obtained for its use as a right of
station-house or place of landing by any statute of
r by occupation of the same by any person whatever,"
ction 2009 of the Code "Such telegraph company shall

be entitled to the right of way over the lands, privileges and easements of other corporations." And this section 2010 uses similar language.

Indeed, it may be questioned if a railroad company or-
69 ganized as a corporation for the specific purpose of running and operating a railroad, can have in its right of way any other title, except for these purposes and so long only as they are preserved.

1 Redfield on Railways, 218, sec. 61, ch. X.

If this be so, the whole right of way is but an easement.

There is yet another view. There can be no doubt that the right of eminent domain, being a high, and at times harsh, exercise of the sovereign power, the form of proceeding prescribed by statute must be strictly pursued. The necessity for and the right to its exercise must exist and be shown, and the mode of its exercise must be rigidly followed. At the same time, when it is given for the promotion of a great public benefit, in its use of the gift the corporation should not be harrassed and hindered by narrow and technical construction of the words of the statute, nor should such a construction by adopted as will make the gift wholly impracticable and valueless.

If this plaintiff be compelled to go into every county through which the railway company has built its way, and there seek the relief it seeks here, its interests will be put into the hands of very many boards of commissioners, whose conclusions would be naturally conflicting, perhaps contradictory. The enterprise of a telegraph company, now one of the necessities of the commercial world, will be delayed, hampered, perhaps defeated.

The demurrer to the answer is sustained.

(Signed) CHARLES H. SIMONTON,
Circuit Judge.

17 Oct., 1898.

Endorsed: Filed in this office Octo. 18th, 1898, at 2 o'clock p. m. Sam'l L. Trogdon, clerk.

Order Sustaining Demurrer and Reinstating Order Dated September 15th, 1898.

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Virginia.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

This day came the defendant railway company and by leave of court filed its answer to the complainant's written notice and
70 motion, to which said answer the plaintiff telegraph company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby

nd the defendant having asked leave to introduce testi-
ining the averments of its answer, which leave was re-
e court—
efore ordered, that the former order made by this court,
ie clerk of this court at Greensboro, North Carolina, to
amissioners to assess the damages in the above-entitled
reby reinstated; and the clerk of this court is directed
not earlier than ten days after the entry of this order
ting of said commissioners, to all of which action of the
ot leave of the court to the defendant to file its answer,
ant excepts.

CHARLES H. SIMONTON,
Circuit Judge.

898.

l: Filed in this office Octo. 26, 1898. Sam'l L. Trogdon,

ocket Entry Following Record of the Above Order.

ndants, The Southern Railway Company, appeals from
of the court and from all former orders made in said
e telegram of F. H. Busbee, on file.) This Nov. 3, 1898.
SAM'L L. TROGDON, *Clerk.*

tice to Commissioners to Meet on Nov'r 3rd, 1898.

TATES OF AMERICA, }
District of No. Ca. }

uit Court, Fourth Circuit, at Greensboro, October 24th, 1898.

L TELEGRAPH-CABLE COMPANY } Notice to Commissioners
vs. } to Meet on November
THERN RAILWAY COMPANY. } 3rd, 1898.

Sales, J. M. Walker, and Jas. A. Hodgin, commissioners
bove entitled case:

You are hereby summoned and directed to appear and be
he court-room in the U. S. building at Greensboro, N. C.,
November 3rd, 1898, at 10 o'clock a. m., at which time
a hearing will be had by you for the purposes expressed
er of his honor, Charles H. Simonton, authorizing your
nt and in the notice heretofore served on you.
my hand and seal of this court, October 24th, 1898.
] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

ted by reading and delivering a copy of the within no-
s. A. Hodgin, J. M. Walker and A. M. Scales, at Greens-

J. A. LOGAN, *O. D. M.*"

Endorsed: Filed in this office Nov. 25th, 1898. Sam'l L. Trogdon, clerk.

Notice to Parties of Meeting of Comm'rs on Nov. 3rd, 1898.

UNITED STATES OF AMERICA,
Western District of North Ca.

In the Circuit Court, Fourth Circuit, at Greensboro, October 24th, 1898.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY. } Notice of Condemnation Proceedings.

To the above-named parties and their attorneys:

You will take notice that the hearing by the commissioners, appointed in this cause, for the purposes expressed in the order of his honor, Charles H. Simonton, and in the notice heretofore given you, which hearing was stayed by a further order of his honor, Charles H. Simonton, will now proceed, and that said hearing will be had in the court-room in the U. S. building in Greensboro, N. C., on Thursday, November 3rd, 1898, at 10 o'clock a. m., of which hearing you will take notice.

Witness my hand and seal of this court, Octo. 24th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

72 *Marshal's Return.*

"Executed Octo. 24th, 1898, by reading and delivering a copy of within notice to W. E. Coffin, agent of Southern Railway Co., at Greensboro, N. C.

J. A. LOGAN, *U. D. M.*"

Endorsed: Filed in this office Octo. 25, 1898. Sam'l L. Trogdon, clerk.

Notice to Commissioners Continuing Hearing Set for Nov. 3rd, '98.

UNITED STATES OF AMERICA,
Western District of No. Ca.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY COMPANY. } Notice Continuing Condemnation Proceedings by Commissioners on November 3rd, 1898.

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, commissioners in the above-entitled cause:

You are hereby notified that the hearing to be had on November 3rd, 1898, notice of which has been duly served on you, is hereby

continued until further notice may be given you, fixing another date for said hearing in the above-entitled cause.

Witness my hand and seal of this court, Octo. 29th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Service of Notice by Mail.

The above paper served by mailing a certified copy to each of the above-named commissioners.

10, 31, 1898.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office Octo. 31st, 1898. Sam'l L. Trogdon, clerk.

73 *Notice to Parties Continuing Hearing Set for Nov. 3rd, 1898.*

UNITED STATES OF AMERICA,
Western District of N. C.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice Continuing Condemnation Proceedings by Commissioners on Nov'r 3rd, 1898.

To the above-named parties and their attorneys:

You will take notice that the hearing to be had on November 3rd, 1898, by the commissioners appointed in this cause, notice of which hearing has heretofore been given you, is hereby continued until further notice may be given you fixing another date for said hearing in the above-entitled cause.

Witness my hand and seal of this court Octo. 29th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

"Received Octo. 29th, 1898. Executed Octo. 29th, 1898, by reading and delivering a copy of this notice to W. E. Coffin, agent for the So. R'y Co., at Greensboro.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY, *Deputy.*"

Endorsed: Filed in this office Octo. 31, 1898. Sam'l L. Trogdon, clerk.

Defendant's Bill of Exceptions No. 3.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* SOUTHERN RAILWAY COMPANY. } Defendant's Bill of Exceptions No. 3.

Be it remembered that on the 23rd day of September, 1898, the court having, upon the application of the defendant, required the plaintiff to show cause on the 7th of October, 1898, why the defendant should not have leave to file its answer to the petitions
74 filed by the plaintiff in the cause, and why the aforesaid order of September the 15th, 1898, should not be vacated and annul-ed (no other proceedings having intervened since those set out in defendant's second bill of exceptions), and the parties, plaintiff and defendant, having appeared before the court on said 7th day of October, 1898, and the defendant having then by leave of court, filed its answer to said petitions of the plaintiff, and the plaintiff having then and there demurred to the defendant's answer, the court took time to consider, and on the 24th day of October, 1898, delivered a written opidion, and entered an order in said cause, which said opinion and order are in the words and figures following, to wit: (Here insert opinion and order of the court. See opinion on page 66, and order on page 69 of this record); to which action, ruling, order and judgment of the court, sustaining the plaintiff's demurrer to the defendant's answer, refusing and denying defendant's motion to introduce testimony supporting the averments of its answer, reinstating the order made by the court on September the 15th, 1898, directing the clerk of this court at Greensboro, to appoint commissioners to assess the damages in this cause, and directing said clerk to fix a day not earlier than ten days after the entry of said order of October 24th, 1898, for the meeting of said commissioners, the defendant by counsel excepted.

And thereupon said Samuel L. Trogdon, clerk, having, on said 24th day of October, 1898, made an order summoning the commissioners heretofore appointed by him to assemble and go on with the hearing of the cause, and also issued a notice to the parties to the cause to attend said hearing, which order and notice are in the words and figures following, to wit: (Here insert order and notice of the clerk. See order on page 70, and notice on page 71 of this record); to all this above-recited action of said Samuel L. Trogdon, clerk, the defendant by counsel also excepted, and prayed that this, its third bill of exceptions, be signed, sealed, enrolled, and made a part of the record in this cause, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4 November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

75 *Order Making Defendant's Exceptions a Part of the Record.*

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The defendant, having at the time of their entry, excepted to the following orders of this court in this cause, and the court having duly noted each, every and all of said exceptions, viz:

1. The order overruling defendant's demurrer and motion to dismiss (containing sixteen assignments) because the complaint did not set forth facts sufficient to constitute a cause of action, the exception of the defendant being to the action of the court in overruling each of said grounds of demurrer and each of said grounds to dismiss as aforesaid.

2. The order of the court herein, dated September 15th, 1898, directing the clerk of this court at Greensboro, North Carolina, to appoint three disinterested commissioners to assess damages as therein set out, prescribing the oath to be taken by said commissioners and directing the mode of procedure and the principles and rules by which said commissioners shall be governed, their place of sessions and how they shall be presided over, the elements which said commissioners shall consider and the form and substance of the report to be made by them, to each and all, and every of which rulings and directions of the court the defendant excepted; the said exceptions being intended to cover each, all and every ruling contained in the said order, and the said order in all of its parts and provisions.

3. The order made by Samuel T. Trogdon, clerk of this court at Greensboro, appointing Alfred M. Scales, John M. Walker and J. A. Hodgin as commissioners to assess the damages of said defendant, as set out in said order, dated September 19th, 1898, and fixing the time and place for the meeting of the said commissioners, and the exceptions of the defendant being intended to cover the aforesaid ruling and action of the said clerk and being intended as exceptions to the said order in each, all and every of its provisions.

4. The order of the court made on the 24th day of Octo-
76 ber, 1898, sustaining plaintiff's demurrer to the answer filed by the defendant, and refusing and denying to the defendant leave to introduce testimony sustaining the averments of its answer and reinstating the aforesaid order made by this court on the 15th day of September, 1898, and directing the clerk of this court to fix a day for the meeting of said commissioners heretofore appointed by him as aforesaid, to all of which rulings contained in the said order of October 24th, 1898, the defendant excepted, the said exceptions being intended to cover each, all and every ruling

contained in said last-named order, except the leave given by the court to the defendant to file its answer.

Thereupon, it is ordered, that the exceptions of the defendant be made a part of the record herein, which is hereby done; and the defendant has leave to file its bill of exceptions, if it be so advised at any time within twenty days.

CHARLES H. SIMONTON,
Circuit Judge.

Oct. 24, 1898.

Endorsed: Filed in this office Oct. 26, 1898. Sam'l L. Trogdon, clerk.

Notice of Appeal.

In the United States Circuit Court for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

To the Postal Telegraph-Cable Company, the plaintiff above named:

Please take notice that The Southern Railway Company, the defendant above named, appeals from the order made in the above-entitled cause by his honor, Charles H. Simonton, on October 24th, 1898, which order sustains the plaintiff's demurrer to the defendant's answer to the petition of the plaintiff, and denies the defendant the right to take testimony, and reinstates the order of September 15th, 1898, directing the clerk to appoint commissioners, &c., as will fully appear from the said order.

The defendant also appeals from all prior and intermediate orders made in said cause.

STILES & HOLLADAY,
F. H. BUSBEE,
Counsel for Defendant.

Nov. 3rd, 1898.

77 *Marshal's Return.*

"Received Nov. 4, 1898. Executed Nov. 4, 1898, by reading and delivering a copy of the notice to A. L. Brooks.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BAILEY, *Deputy.*

Fees, $2.00."

Endorsed: Filed in this office Nov. 4, 1898. Sam'l L. Trogdon, clerk.

Notice of Having Directed Clerk to Enter Appeal on Docket.

n the Circuit Court of the United States for the Western District of North Carolina.

'OSTAL TELEGRAPH-CABLE COM-pany *vs.* SOUTHERN RAILWAY COMPANY.	In Proceeding to Condemn Right of Way for Telegraph Purposes on Property of Southern Railway Company.

To the Postal Telegraph-Cable Company :

Take notice, that the defendant, The Southern Railway Company, has directed the clerk of the United States circuit court for the western district of North Carolina, at Greensboro, to enter upon the judgment docket, or other proper order book of said court, that, in the condemnation case of The Postal Telegraph Cable Company *vs.* Southern Railway Company, the defendant appeals from the order of the court entered on the 24th day of October, 1898, which order sustains the plaintiff's demurrer to the defendant's answer to the petition of the plaintiff, and said defendant the right to take testimony in support of its said answer, and reinstates the order of September the 15th, 1898, directing the said clerk to appoint commissioners to fix the compensation to be paid to defendant for the damages resulting from the erection of the plaintiff's telegraph line upon the defendant's right of way, and effects a substantial right claimed in the proceeding, and determines the action and settles the principles of the cause, it being intended that said appeal shall also bring up for review, so far as may be desired, any and all intermediate orders involving the merits, and necessarily affecting the said judgment and order of October 24th, 1898.

SOUTHERN RAILWAY COMPANY.
By STILES & HOLLADAY, *Its Attorneys.*

STILES & HOLLADAY, *Of Counsel.*

Service Accepted.

Endorsed.

Legal service of within notice is hereby acknowledged, and undertaking a deposit named, without, however, in any way admitting the right of appeal at the present stage of this case. I will deny and contest your right now to appeal.
This November 3, 1898.

J. R. McINTOSH,
Counsel for Telegraph Company.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

9—303

Petition for Writ of Error.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

Petition for writ of error.

To the honorable judges of the circuit court of the United States for the western district of North Carolina:

1. Your petitioner, The Southern Railway Company, respectfully represents that it is the sole defendant in this suit, and that The Postal Telegraph-Cable Company is the sole plaintiff therein.

2. Your petitioner, conceiving itself aggrieved by the order made herein by the circuit court on the 24th day of October, 1898, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by orders made by the said circuit court dated August 31, 1898, and September 15th, 1898, and by two orders of the clerk of the circuit court of the United States at Greensboro, dated, respectively, September the 19th, 1898, and October 24, 1898, does hereby appeal from said order of the circuit court dated October 24, 1898 (and all of the above-recited orders of said circuit court, and of the clerk thereof), to the United States circuit court of appeals, fourth circuit, for the reasons set out and specified in the assignment of errors filed herewith, and your petitioner prays that a writ of error may be allowed it; that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States circuit court of appeals for the fourth circuit, and that the said orders of October 24, 1898, and all of the other aforesaid orders, may be reviewed and reversed by the said United States circuit court of appeals.

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3. And your petitioner prays for such other, further and general relief as may be proper in matters of this character. And your petitioner will ever pray, &c.

SOUTHERN RAILWAY COMPANY,
By STILES & HOLLADAY AND
F. H. BUSBEE, *Counsel.*

Endorsed: Submitted 4 November, 1898, and refused in opinion 9 November, 1898. Charles H. Simonton, circuit judge.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Assignment of Errors.

the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE CO.
vs.
SOUTHERN RAILWAY CO.

Assignment of errors.

signment of errors filed by the Southern Railway Company, with its petition for a writ of error from an order entered in said cause October 24, 1898, and preceding orders.

And now, on this 4th day of November, 1898, came the petitioner, e Southern Railway Co., the defendant in the above-styled suit, F. H. Busbee and Stiles & Holladay, its attorneys, and says that orders entered in the said cause, to wit: the orders entered by court and dated August 31st, 1898, September 15th, 1898, and ober 24th, 1898, and the orders entered by the clerk of this court Greensboro, dated September 19th, 1898, and October 24th, 1898, erroneous and against the rights of the appellant, The Southern ilway Company; and said petitioner, The Southern Railway mpany, assigns for error and will contend in the appellate court t the court below erred as follows:

. That the order of the circuit court dated August 31, 1898, over-ing your petitioner's motion to dismiss the petitions of the plain-filed in this cause, for that said petitions did not state facts and unds sufficient to constitute a cause for action, was erroneous. e court should have sustained said motion to dismiss (called by court in said order dated August 31, 1898, a demurrer) and uld have dismissed said petitions for the reasons set out in writ-in said motion and now repeated, that is to say:

. Because the petitions of the Postal Telegraph-Cable Company , and each of them fails to set out facts and grounds constituting ause of action.

. Because the aforesaid petitions are wholly inconsistent. The tal Telegraph-Cable Co. grounds its application and cause of on in the first petition filed by it upon the statutes of North olina, supposed by it to be in force, and by its last petition unds its application upon — acts of Congress.

. Because no law exists now in force on the statute books of rth Carolina by which a telegraph company is authorized to con-m a right of way for telegraph purposes on the land of a rail-d company, or on the right of way of a railroad company.

. Because the superior court of Guilford county, North Carolina, which this suit was instituted, and from which this cause was re-ved to this honorable court, had no jurisdiction to entertain, r and determine the questions presented in this cause, and no wer or jurisdiction to condemn the land, right of way or property

of this defendant, as prayed in the said petitions, or either of them.

81 5. Because no law exists, now in force on the statute books of North Carolina, by which the plaintiff, Postal Telegraph-Cable Co., is authorized to condemn a right of way for telegraph purposes along and upon the property of the Southern Railway Co., from, to, and between the several points set out in the petitions filed in this proceeding.

6. Because the plaintiff, Postal Telegraph-Cable Co., is not authorized by law to condemn a right of way for its purposes as set out in its petitions, under, and by virtue of chapter 49 of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof.

And because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant Southern Railway Company as a right of way; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

7. Because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property, over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way, or by a title which the law knows or denominates as an easement, or right of way, as contradistinguished from a different or fee-simple title; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

8. Because said petitions, and each of them, fail to describe the parcels of land, privilege or easement over and upon which said telegraph right of way is sought to be condemned; and because the plaintiff, Postal Telegraph-Cable Co., does not allege that it has surveyed the line or route of its proposed right of way and made a map or survey thereof by which such route or line is designated, and that they have located their said right of way for telegraph

82 purposes according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which their said telegraph lines are to be constructed.

9. Because section 2012 of the Code of North Carolina of 1883 provides as follows, viz:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment,

to be as provided in this chapter in condemning, &c., for rail-
s.

The proceedings for the condemnation of lands, or any easement,
terest therein, for the use of telegraph companies, the appraisal
e lands, or interest therein, the *the* duty of the commissioners
praisal, the right of either party to file exceptions, the report
mmissioners, the mode and manner of appeal, the power and
ority of the court or judge, the final judgment, and the manner
s entry and enforcement, and the rights of the company
ling the appeal, shall be as prescribed in this chapter for con-
ning lands to the use of railroads."

nd because the Postal Telegraph-Cable Co. has wholly failed to
ply with the requirements of said section 2012 of the Code of
h Carolina in the filing of its petitions, and each of them, in
cause and the conduct of proceedings to condemn the property
e defendant.

. Because vital provisions contained in section 1944 of the Code
orth Carolina of 1883, have been repealed by an act of the Gen-
Assembly of North Carolina, ratified the 6th day of March, A. D
, which said act, together with its chapter number and title
n the following words and figures, to wit:

Chapter 396, Acts 1893.

act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty- of chapter forty-nine of the Code be amended by striking out aid section all from the word 'charter' in line sixteen of said on down to and including the word 'constructed' in line ty-four thereof.

SEC. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purpose of a oad that at the time that the summons for such condemnation rved, there shall also be served by the railroad company a map ving how the line of the road is located on the land sought to ondemned, and a profile showing the depth of the cuts and the hts of the embankments on the land so sought to be condemned, at what points on such land such cuts and embankments are ted.

SEC. 3. That section one thousand nine hundred and fifty-three hapter forty-nine of the Code be amended by striking out from word 'thereby' in line four down to and including the word nge' in line seven of said section.

SEC. 4. That this act shall not affect any pending litigation.

SEC. 5. That this act shall be in force from and after its ratifi-on.

Ratified the 6th day of March, A. D. 1893."

11. Because section 2012 of the Code of North Carolina of 1883, hereinbefore copied, requires that the mode and manner of ascertaining just compensation for the property or rights condemned or acquired by the condemning corporation, shall be ascertained as prescribed by said section 1946 of the Code of North Carolina of 1883, and said section 1946 has been repealed for all purposes in this particular, and on this subject by an act of the General Assembly of North Carolina, published in Public Laws of North Carolina, session of 1893, as chapter 160, which said act, together with chapter, number and title, are as follows, viz:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs
84 of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

12. And because the following provision and language contained in said section 1946 of the Code of North Carolina has been stricken out, repealed, and is no longer in force for any purpose; the words so stricken out and repealed, together with the only proviso thereto are as follows:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said* land, then the *railroad company shall pay the costs of the proceedings and shall not have a judgment for the excess of benefits over the damages.*"

13. Because the said Postal Telegraph-Cable Co., failed at the time that the summons in this cause was served upon the Southern Railway Co., to also serve upon this defendant a map showing how the line or route of the right of way sought to be condem-ed on the property of the defendant is located, and the metes and bounds thereof; and because the said Postal Telegraph-Cable Co. failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, ratified the 6th

March A. D. 1893, hereinbefore copied—in that it failed to on this defendant this map required by the said last-named or any map whatever—and because said failure is shown id by the proceedings in this cause.

ecause section 2012 of the Code of North Carolina of 1883 s that all proceedings for the condemnation of land, or any it therein, for the use of telegraph companies shall be as ed in chapter 49 of the Code of North Carolina of 1883 for ning lands to the use of railroads; and because sections 944, 1946, and 1952 of said chapter 49 have been amended nd changed in vital particulars and repealed for all purposes so far as they applied to this defendant, Southern y Company.

he defendant, Southern Railway Co., moves to dismiss the titions and each of them in this proceeding, because the Telegraph-Cable Co. fails to set out clearly and accurately it of way which it seeks to condemn, its location and the nd bounds thereof, and all the purposes for which it desires ne proposed right of way sought to be condemned.

ecause the laws of North Carolina do not and never have olated an indefinite, uncertain, changing and wobbling right such as is described in the aforesaid petitions and each of

d. The appellant, The Southern Railway Company, further and will contend in the appellate court that the order of t herein dated September 15, 1898, was erroneous and should rsed for the sixteen reasons above assigned as error comby the circuit court in its order overruling your petitioner's to dismiss the plaintiff's petition because they failed to state d grounds constituting a cause of action, and also because der of September 15, 1898, was prematurely entered and notice to your petitioner, and because neither said order of er 15, 1898, nor the powers, duties, and proceedings of the sioners, thereby directed to be appointed, as set out in said ere authorized by law and also because the court, in the said order, erred in directing its clerk to appoint commisto assess damages as therein set out, and erred in prescribing to be taken by said commissioners and in directing the procedure and the principles and rules by which said sioners should be governed, and erred in fixing the place essions of said commissioners and how they shall be per, and the elements to be considered by them and the form stance of their report.

. The appellant, The Southern Railway Company, further and will insist in the appellate court that the order herein mber 19, 1898, made by Samuel L. Trogdon, clerk of this as erroneous and should be revised, because the said clerk awful authority to make said order, and because said order neous for the same reasons above set out in respect to the foresaid order of September 15, 1898.

86 Fourth. The appellant, The Southern Railway Company, submits, and will insist in the appellate court, that the order of the circuit court herein of October 24, 1898, sustaining the plaintiff's demurrer to defendant's answer, refusing to allow your petitioner to introduce evidence in support of the allegations of its answer and otherwise ordering as therein ordered, was erroneous and should be reversed for all of the reasons above assigned for reversing the orders of the court dated August 31, 1898, and September 15, 1898, and further, because the court by said order of October 24, 1898, erred in not holding that your petitioner's answer set up a complete defense. The court should have held that each of the grounds of defense set up in said answer (which said grounds are prayed to be treated and considered as if here again inserted at full length), constituted a full and complete defense to the plaintiff's petitions and required their dismissal by the court; and that the court also erred in refusing to allow your petitioner to introduce testimony in the support of the allegations of the said answer, and for the reasons aforesaid, erred in reinstating the aforesaid order of September 15, 1898, and in directing the clerk of the court to fix a day for the meeting of the commissioners appointed by him.

Fifth. The appellant will also submit and insist in the appellate court that the order made by Samuel L. Trogdon, clerk of this court, dated October 24, 1898, was erroneous, and should be reversed for the reasons above assigned as to his order of September 19, 1898.

Sixth. For these and other reasons appearing upon the face of the orders above described and proceedings in this cause, your petitioner prays for a writ of error to said order of the court dated October 24, 1898 (and also to each of the above orders), and for a supersedeas to said order of said circuit court dated October 24, 1898.

SOUTHERN RAILWAY COMPANY,
By STILES AND HOLLADAY AND
F. H. BUSBEE, *Counsel.*

Submitted with petition.

C. H. S.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

87 *Opinion Refusing an Appeal.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit. At Law.

THE POSTAL CABLE-TELEGRAPH COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The petition for condemnation being before the court with an answer thereto, the petitioner interposed a demurrer to the answer.

rrer went to the merits and was not formal. After argu-demurrer was sustained. Thereupon, pursuing the pro-he statute of North Carolina, an order was entered looking ointment of commissioners. At this stage the defendant tition for leave to appeal, accompanied by exceptions and ts of error. The question is, Is this judgment on the de-inal judgment?

nent or decree to be final for the purpose of review must litigation on the merits so that on affirmance by this court below would have nothing to do but to execute the or decree already rendered. Bostwick *vs.* Brinckerhoff, 3.

ing this rule, we find in Life and Fire Ins. Co. of N. Y. 9 Pet., 571, though the merits of the cause have been lly decided while anything, though formal, remains to be court cannot pass on the subject. So, also, in Lata *vs.* 150 U. S., 524, a decree which refers a case to a master to ccount between the parties, upon which a further decree tered, is not final.

ington, &c., *vs.* Simmons, 123 U. S., 52, a decree establish-ght of a junior mortgagee to redeem from a prior mort-not determining the amount he must pay, or the amount e mortgage, is interlocutory.

Palmira, 10 Wheaton, 502, a decree for restitution, with damages, was held not to be final, as the damages were scertained.

e *vs.* Vasques, 11 Wheaton, 429, where a decree for dam-llowed on a libel, and commissioners were appointed to he amount of damages, it was held that no appeal would ie commissioners reported, for it was not a final decree.

tter seems to be settled by Luxton *vs.* North River Bridge 147 U. S., 341. That was a case of condemnation of land. ame up on a writ of error, seeking to reverse an order ointing commissioners on petition for that purpose. The : "The case throughout, from the application of the cor-or the appointment of commissioners to assess damages to of the land proposed to be taken, until judgment upon of the commissioners, or upon the verdict of a jury asses-ing ages, remains in the circuit court of the United States and upervision and control. The action of that court in this other cases on the common-law side, is not reviewable by by certiorari, but only by writ of error, which does not fter final judgment disposing of the whole case and ad-all the rights, whether of title or damages, involved in on. The case is not to be sent up in fragments by suc-ts of error.

uthorities lead to the conclusion that there is no final in this case. The petition for writ of error is refused.

CHARLES H. SIMONTON,
Circuit Judge.

ıber, 1898.
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Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Order Refusing an Appeal.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

Upon the entry by the court of the order herein of October 24, 1898, sustaining the plaintiff's demurrer to the defendant's answer, and otherwise ordering as therein ordered, the defendant then and there gave notice in open court of its purpose to appeal, and wrote out and delivered in open court to the counsel for the plaintiff a paper containing, amongst other things, a proper statement and assignments of error alleged and grounds of appeal from the orders of the court herein, dated August 31, 1898, September 15, 1898, and October 24, 1898, respectively, and the order of the clerk of this court, at Greensboro, dated September 19, 1898, which paper
89 was made an order of court and part of the record, and then the defendant moved the court to allow it a writ of error to the aforesaid order of October 24, 1898, and previous orders, and thereupon, on the motion of the plaintiff, the court continued said application of the defendant for a writ of error until the 4 day of November, 1898, and fixed that day for a hearing on said application.

And, the defendant, having been given twenty days from October 24, 1898, to prepare its bills of exception, on this 3 day of November, 1898, came the defendant and tendered to the court its three bills of exception, which were signed and sealed and made a part of the record.

And the defendant also tendered to the court a formal petition for a writ of error, together with an assignment of errors, and prayed the court to grant such writ of error. The prayer of which petition has been refused—the petition having been presented on 4 November, 1898, and refused 9 November, 1898.

CHARLES H. SIMONTON,
Circuit Judge.

Endorsed: Filed in this office Nov. 14, 1898. Sam'l L. Trogdon clerk.

Order Reinstating Order of September 15, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In Circuit Court. At Law.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

This cause coming on for hearing before the judge at chambers, in the city of Richmond, Va., on the 7th day November, 1898, the hearing having been adjourned from November 4, 1898, upon the petition of the defendant railway company, for writ of error to the circuit court of appeals, from an order made at chambers in Charleston, S. C., on the 24th day of October, 1898, sustaining the demurrer of plaintiff telegraph company, to the answer of defendant railway company, and reinstating an order made September 15th, 1898, for the appointment of commissioners to assess the damages to which the railway company is entitled for the use of so much of the right of way of defendant railway company as prayed for in the original petition of said plaintiff.

90 And after argument by counsel for the plaintiff and defendant, and the court being of opinion that said order from which defendant petitions for appeal is not a final order from which an appeal lies, it is, therefore, ordered, adjudged, and decreed that the said petition for writ of error be, and the same is hereby, denied. And it is further ordered that said order for the appointment of commissioners be, and the same *it* hereby reinstated, and the clerk of this court at Greensboro, North Carolina, Sam'l L. Trogdon, Esq., is hereby authorized and directed to give notice to the commissioners heretofore appointed by him, and the defendant railway company, to assemble in the U. S. court-room at Greensboro, North Carolina, at a time not less than ten days from said notice, to assess the damages to which the said railway company is entitled from the said plaintiff telegraph company, as authorized and decreed in said first order directing the appointment of said commissioners.

CHARLES H. SIMONTON,
Circuit Judge.

9 November, 1898.

Notice that Defendant Excepts.

On the signing of this order, defendant gives notice that it excepts.

CHARLES H. SIMONTON.

Endorsed: Filed in this office Nov. 14th, 1898. Sam'l L. Trogdon, clerk.

Notice to Commissioners to Meet November 28th, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice to Commissioners to Meet on November 28th, 1898.

To A. M. Scales, J. M. Walker, and James A. Hodgin, commissioners in the above-entitled case:

In pursuance of an order made by his honor, Charles H. 91 Simonton, dated November 9th, 1898, and other decrees and orders theretofore made: You are hereby summoned and directed to appear and be in the court-room in the U. S. building at Greensboro, N. C., on November 28th, 1898, at 10 o'clock a. m., at which time and place a hearing will be had by you for the purposes expressed in the order of his honor, Charles H. Simonton, authorizing your appointment, and in the notice heretofore served on you.

Witness my hand and seal of this court November 14th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

"Received November 15, '98. Executed Nov. 15, '98, by reading and delivering a copy of this notice to each of the commissioners, A. M. Scales, J. M. Walker and Jas. A. Hodgin.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY,
Deputy Marshal."

Endorsed: Filed in this office Nov. 15, 1898. Sam'l L. Trogdon, clerk.

Notice of Hearing by Comm'rs Nov. 28, 1898.

UNITED STATES OF AMERICA,
Western District of No. Ca.

In the Circuit Court, Fourth Circuit.

POSTAL TELEGRAPH CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice of Hearing by Commissioners in Condemnation Proceedings.

To the above-named parties and their attorneys:

You will take notice that the hearing by the commissioners appointed in this cause, for the purposes expressed in the order of his honor, Charles H. Simonton, and in the notice heretofore given you, which hearing was stayed by a further order of his honor, Charles

H. Simonton, will now proceed under an order dated Nov. 9th, 1898, and that said hearing will be had in the court-room in the U. S. building in Greensboro, N. C., on Monday, November 28th, 1898, at 10 o'clock a. m., of which hearing you will take notice.

Witness my hand and seal of this court November 14th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

92 *Marshal's Return.*

Received Nov. 15, '98. Executed Nov. 15, '98. By reading and delivering a copy of this notice to W. E. Coffin, agent of So. R'y Co., at Greensboro, N. C.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY,
Office D. M.

I hereby except service on within notice. Nov. 14th, 1898.

L. A. BROOKS,
Att'y for Pl'tff.

Endorsed: Filed in this office Nov. 14, 1898. Sam'l L. Trogdon, clerk.

Oath of A. M. Scales, Comm'r.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY }
vs. }
THE SOUTHERN RAILWAY COMPANY. }

I, A. M. Scales, a commissioner duly appointed in the above-entitled cause, do solemnly swear that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability. So help me God.

A. M. SCALES.

Subscribed and sworn to before me this the 28th day of November, 1898.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office Nov. 28th, 1898. Sam'l L. Trogdon, clerk.

93 *Oath of J. M. Walker, Comm'r.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

I, J. M. Walker, a commissioner duly appointed in the above-entitled cause, do solemnly swear that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability. So help me God.

J. M. WALKER.

Subscribed and sworn to before me this the 28th day of Nov'r, 1898.

—— ——.

Endorsed: Filed in this office Nov. 28, 1898. Sam'l L. Trogdon, clerk.

Affirmation of J. A. Hodgin, Comm'r.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

I, J. Addison Hodgin, a commissioner duly appointed in the above-entitled cause, do solemnly affirm that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability, and this — my solemn affirmation.

J. ADDISON HODGIN.

Subscribed and affirmed to before me this the 28th day of Nov., 1898.

SAM'L L. TROGDON, *Clerk.*

94 Endorsed: Filed in this office Nov. 28, 1898. Sam'l L. Trogdon, clerk.

Report of Commissioners.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

To the honorable the judges of the circuit court of the United States, fourth circuit:

Pursuant to a summons issued on the 19th day of September, 1898, by S. L. Trogdon, clerk of U. S. circuit court, at Greensboro, North Carolina, notifying us of our appointment as commissioners in the above-entitled action to assess the damage of the said Southern Railway Company, which may accrue to the said company by reason of the construction of a line of telegraph along its right of way by the plaintiff, The Postal Telegraph-Cable Company, and in pursuance of a further summons issued by the said S. L. Trogdon, clerk as aforesaid, on the 14th day of November, 1898, directing us to appear and be in the court-room in the U. S. building at Greensboro, N. C., on the 28th day of November, 1898, at 10 o'clock, a. m., for the purpose of assessing the damage as aforesaid, we, your commissioners, meet at the time and place aforesaid, as directed, with S. L. Trogdon, clerk as aforesaid, presiding.

Whereupon the following proceedings are had, to wit:

The plaintiff, The Postal Telegraph-Cable Company is present by attorney, A. L. Brooks, Esq., the defendant not being present in person or by attorney, A. L. Brooks, Esq., attorney as aforesaid, produces a paper signed by F. H. Busbee, Esq., attorney for defendant agreeing to a continuance of the hearing of said matter to Wednesday, November 30th, 1898, at 10 o'clock, a. m., which said paper is hereto attached and marked Exhibit A.

Whereupon, upon motion of A. L. Brooks, Esq., attorney as aforesaid, the commission takes a recess until the 30th day of November, 1898, at 10 o'clock, a. m.

GREENSBORO, N. C., *November* 30, 1898.

Pursuant to adjournment, the commission meets at the place specified in the summons as aforesaid on the 30th day of November, 1898, at 10 o'clock, a. m., with S. L. Trogdon, clerk as aforesaid presiding—whereupon the following proceedings are had, to wit:

The plaintiff is present by A. L. Brooks, Esq., attorney, the defendant not being present in person or by attorney. It appearing to the commissioners that an appeal has been granted by your honorable court to the defendant and that all proceedings by the commissioners are stayed until further orders of the court, and upon motion of A. L. Brooks, attorney as aforesaid, the commissioners

adjourn subject to the order of the court, to meet upon motion given by S. L. Trogdon, clerk as aforesaid.

Your commissioners would respectfully recommend that the court allow $2.50 each to Misses Georgia Simpson and Emily Austin, stenographers and typewriters, employed by the commission to take evidence in the said case, and who are in attendance at the meeting today.

Respectfully submitted as our report of the proceedings to this date.

Witness our hands this the 30th day of November, 1898.

ALFRED M. SCALES,
Commissioner.
J. M. WALKER,
Commissioner.
J. ADDISON HODGIN,
Commissioner.

EXHIBIT A.

We shall not interpose any objection to the Postal Telegraph-Cable case going over from Monday until Wednesday, Dec. 1.

SO. RY CO.,
By F. H. BUSBEE.

Nov. 26th, 1898.

Endorsed: Filed in this office Nov. 30th, 1898. Sam'l L. Trogdon, clerk.

Order Setting Aside Order Made November 9th, 1898, and Granting Writ of Error.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

It is ordered that the order made herein on the 9th day of
96 November, 1898, refusing to allow the defendant a writ of error and supersedeas, as prayed in its petition and assignment of errors filed in this cause on the 4th day of November, 1898, be and the same is hereby set aside, and the writ of error and supersedeas, prayed in said petition and assignment of errors are hereby granted, provided the defendant within the next ten days files in the papers of this cause bond in the penalty of one thousand dollars as provided by law, with surety to be approved by one of the judges of this court.

NATHAN GOFF,
U. S. Circuit Judge.

November 29, 1898.

Endorsed: Filed in this office Dec. 1st, 1898. Sam'l L. Trogdon, clerk.

Stipulations of Counsel.

he Circuit Court of the United States for the Western District of North Carolina.

ostal Telegraph-Cable Company
vs.
Southern Railway Company. } Stipulations of Counsel.

er containing 16 grounds of motion to dismiss referred to and described in defendant's bill of exceptions No. 1.

he defendant, The Southern Railway Company, hereby expressly rving to itself the right further to except to the petition- of the ntiff filed herein, and each of them, for that the same do not facts and grounds sufficient to constitute a cause of action, asks e to state specifically some of its grounds of objection to said ions, and each of them, preliminary to its answer.

he defendant, Southern Railway Co., moves to dismiss the said ions, and each of them, filed by the Postal Telegraph-Cable Co., is proceeding, for the reasons hereafter stated, and on the fol- ng grounds, viz: (Here insert the 16 grounds or reasons set out riting in the assignment of errors, in support of the first of said uments.)

Because the petitions of the Postal Telegraph-Cable Company and each of them fails to set out facts and grounds constituting se of action.

2. Because the aforesaid petitions are wholly inconsistent. The Postal Telegraph-Cable Co. grounds its application and cause of action in the first petition filed by it upon the stat- of North Carolina, supposed by it to be in force, and by its petition grounds its application upon — acts of Congress.

Because no law exists now in force on the statute books of h Carolina by which a telegraph company is authorized to emn a right of way for telegraph purposes on the land of a oad company, or on the right of way of a railroad company.

Because the superior court of Guilford county, North Carolina, hich this suit was instituted, and from which this cause was oved to this honorable court, had no jurisdiction to entertain, and determine the questions presented in this cause, and no r or jurisdiction to condemn the land, right of way or property is defendant, as prayed in the said petitions, or either of them.

Because no law exists, now in force on the statute books of h Carolina, by which the plaintiff, Postal Telegraph-Cable Co., thorized to condemn a right of way for telegraph purposes g and upon the property of the Southern Railway Co., from, to, between the several points set out in the petitions filed in this eding.

Because the plaintiff, Postal Telegraph-Cable Co., is not author- by law to condemn a right of way for its purposes as set out in titions, under, and by virtue of chapter 49 of the Code of North

Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof.

And because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

7. Because said Postal Telegraph Cable Co. fails to allege that the property of the defendant railway Co. upon and over which
98 it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way, or by a title which the law knows or denominates as an easement, or a right of way, as contradistinguished from a different or fee-simple title; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

8. Because said petitions, and each of them, fail to describe the parcels of land, privilege or easement over and upon which said telegraph right of way is sought to be condemned; and because the plaintiff, Postal Telegraph Cable Co., does not allege that it has surveyed the line or route of its proposed right of way and made a map or survey thereof by which such route or line is designated, and that they have located their said right of way for telegraph purposes according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which their said telegraph lines are to be constructed.

9. Because section 2012 of the Code of North Carolina of 1883 provides as follows, viz:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the *the* duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

because the Postal Telegraph-Cable Co. has wholly failed to
r with the requirements of said section 2012 of the Code of
Carolina in the filing of its petitions, and each of them, in
use, and the conduct of proceedings to condemn the property
of the defendant.

10. Because vital provisions contained in section 1944 of
the Code of North Carolina of 1883, have been repealed by
of the General Assembly of North Carolina, ratified the 6th
March, A. D. 1893, which said act, together with its chapter
er and title, are in the following words and figures, to wit:
insert act ratified March 6, 1893, "Exhibit A" at the foot of
aper.)

"EXHIBIT A."

Chapter 396, Acts 1893.

et to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

e General Assembly of North Carolina do enact:

c. 1. That section one thousand nine hundred and forty-four
pter forty-nine of the Code be amended by striking out in
ection all from the word 'charter' in line sixteen of said sec-
own to and including the word 'constructed' in line twenty-
ereof.

c. 2. That (section) one thousand nine hundred and fifty-two
ter forty-nine of the Code be repealed, and the following sub-
l in lieu thereof: That whenever it shall become necessary
demn any land for the purposes of a railroad that at the time
e summons for such condemnation is served, there shall also
ed by the railroad company a map showing how the line of
d is located on the land sought to be condemned, and a pro-
wing the depth of the cuts and the heights of the embank-
on the land so sought to be condemned, and at what points
land such cuts and embankments are located.

c. 3. That section one thousand nine hundred and fifty-three
ter forty-nine of the Code be amended by striking out from
rd 'thereby' in line four down to and including the word
e' in line seven of said section.

c. 4. That this act shall not affect any pending litigation.

c. 5. That this act shall be in force from and after its ratifica-

tified the 6th day of March, A. D. 1893."

Because section 2012 of the Code of North Carolina of 1883,
before copied, requires that the mode and manner of ascer-
taining just compensation for the property or rights con-
demned or acquired by the condemning corporation, shall
be ascertained as prescribed by said section 1946 of the Code
th Carolina of 1883, and said section 1946 has been repealed
purposes in this particular, and on this subject by an act of
neral Assembly of North Carolina, published in Public Laws

of North Carolina, session of 1893, as chapter 160, which said act, together with chapter, number and title, are as follows, viz: (Here insert the said chapter 160, "Exhibit B" at the foot of this paper.)

"EXHIBIT B."

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

12. And because the following provision and language contained in said section 1946 of the Code of North Carolina has been stricken out, repealed, and is no longer in force for any purpose; the words so stricken out and repealed, together with the only proviso thereto are as follows:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to*
101 *said land, then the* said land then the *railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

13. Because the said Postal Telegraph-Cable Co., failed at the time that the summons in this cause was served upon the Southern Railway Co. to also serve upon this defendant a map showing how the line or route of the right of way sought to be condemned on the property of the defendant is located, and the metes and bounds thereof; and because the said Postal Telegraph-Cable Co. failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, ratified the 6th day of March A. D. 1893, hereinbefore copied—in that it failed to serve upon this defendant this map required by the said last-named statute, or any map whatever—and because said failure is shown upon and by the proceedings in this cause.

14. Because section 2012 of the Code of North Carolina of 1883

that all proceedings for the condemnation of land, or any
t therein, for the use of telegraph companies shall be as
d in chapter 49 of the Code of North Carolina of 1883 for
ing lands to the use of railroads; and because sections
46, and 1952 of said chapter 49 have been amended and
in vital particulars and repealed for all purposes so far as
plied to this defendant, Southern Railway Company.
he defendant, Southern Railway Co. moves to dismiss the
itions and each of them in this proceeding, because the
Telegraph Cable Co. fails to set out clearly and accurately
t of way which it seeks to condemn, its location and the
d bounds thereof, and all the purposes for which it desires
e proposed right of way sought to be condemned.
ecause the laws of North Carolina do not and never have
lated an indefinite, uncertain, changing and wobbling right
uch as is described in the aforesaid petitions and each of

der to complete the record and at the same time to avoid the
sary enlargement of it, it is hereby stipulated and agreed,
above paper, as filled out and completed by the reference
made, is identical with and shall substitute the paper re-
rred to and described in defendant's first bill of exceptions
s "paper containing 16 grounds of motion to dismiss,"
hich paper has been misplaced and lost.
rther stipulated and agreed that all the affidavits filed at
e upon the 12 day of July, 1898, or thereabouts, upon the
t of the two motions to perpetuate the injunction in the
use and remand the proceeding to the State court, shall be
part of the record.

J. R. McINTOSH,
Counsel for Postal Telegraph-Cable Co.
STILES & HOLLADAY,
For Southern Railway Co.

sed: Filed in this office Dec. 2, 1898. Sam'l L. Trogdon,

Appeal Bond.

all men by these presents, that we, Southern Railway
y, as principal, and the Fidelity and Deposit Company of
d, having an office at No. 35 Wall street, New York city,
es, are held and firmly bound unto the Postal Telegraph-
mpany, in the full and just sum of one thousand dollars,
d to the said Postal Telegraph-Cable Company, its certain
, executor, administrators, or assigns; to which payment,
truly to be made, we bind ourselves, our heirs, executors,
inistrators, jointly and severally, by these presents.
with our seals, and dated this first day of December, in the
ur Lord, one thousand eight hundred and ninety-eight.
as, lately at a circuit court of the United States for the
district of North Carolina, in a suit depending in said court

between The Postal Telegraph-Cable Company, complainant, and The Southern Railway Company, defendant, a judgment was rendered against the said Southern Railway Company, and the said Southern Railway Company having obtained a writ of error and supersedeas, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Postal Telegraph-Cable Company, citing and admonishing it to be an- appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, on the thirtieth day of December, 1898.

103 Now, the condition of the above obligation is such, that if the said Southern Railway Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By SAMUEL SPENCER, *President.* [SEAL.]

Attest: JOSIAH F. HILL, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By HUGH M. ALLWOOD, *Attorney-in-fact.*

Attest: JOHN W. WOOTEN, *Attorney.*

Sealed and delivered in presence of—

—— ——.

[5-cent revenue stamp attached.]

COUNTY AND STATE OF NEW YORK, *ss:*

On the 1st day of December, in the year 1898, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was the attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation named in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order. And the said Hugh M. Allwood further said that he was acquainted with John W. Wooten, and knew him to be the attorney of said company; that the signature of the said John W. Wooten subscribed to the said instrument was in the genuine handwriting of the said John W. Wooten, and was thereto subscribed by the like order of the said board of directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] J. WHITMORE BARRY,
Notary Public, New York County.

ar meeting of the board of directors of the Fidelity and
it Company of Maryland, held in the office of the com-
in the city of Baltimore, State of Maryland, on the first
f June, 1898, at which was present a quorum of said
ly authorized to act in the premises, on motion, it was
—

l, That in pursuance of section eight hundred and eleven
of Civil Procedure of the State of New York, Henry B.
resident, or John W. Wooten, attorney, or Frank H.
dore F. Wood, Edward T. Platt, Joseph A. Flynn
M. Allwood, attorneys-in-fact of this company in
New York, be, and each of them is, hereby authorized
red to sign, execute and deliver any and all bonds or
s for or on behalf of this company, and to attach thereto
he corporation, the same to be attested by the said John
attorney of the company, or by either one of the other
ve named, as occasion may require."

STATE OF NEW YORK, *ss.:*

V. Wooten, attorney for the Fidelity and Deposit Com-
yland, have compared the foregoing resolution with the
reof, as recorded in the minute book of said company,
by certify that the same is a true and correct transcript
nd of the whole of the said original resolution.
der my hand and seal of the company, at the city of
his 1st day of Dec., 1898.

JOHN W. WOOTEN, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1897.

Resources.

.....	$600,000 00
bonds.....	1,610,800 00
due by agents, less commission.....	101,136 77
k, etc.....	188,587 56
	$2,500,524 33

Liabilities.

s.....	$1,000,000 00
.....	1,000,000 00
.....	435,089 69
rocess of adjustment.....	7,829 78
ted, proof not filed.....	20,507 71
profits.....	37,097 15
	$2,500,524 33

105 COUNTY AND STATE OF NEW YORK, *ss.:*

John W. Wooten, being duly sworn, says that he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1897, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 1st day of Dec., 1898.

[SEAL.] J. WHITMORE BARRY,
Notary Public, New York County.

Statement of the Financial Condition of the Fidelity and Deposit Company of Maryland at the Close of Business September 30, 1898.

RESOURCES.

Par value.		Market value.
	Real estate (Fidelity building).....	$600,000 00
$501,800,	Baltimore city stock, 3½ per cent. 1928, 1930, 1940, 1945.....	529,820 00
48,000,	Do. Do. 6 per cent. 1900.....	49,440 00
200,000,	New York city gold export dock bonds....	218,000 00
100,000,	State of Maryland insane asylum bonds, 3½ per cent. loan	105,000 00
125,000,	State of Georgia, 4½ per cent. bonds, 1911, 1912, 1916.....	139,750 00
30,000,	State of Tennessee, 3 per cent. bonds.....	26,400 00
50,000,	City of Buffalo, N. Y., 3½ per cent. bonds..	51,500 00
25,000,	City of Westminster, Md., 4½ per cent. bonds.	25,000 00
39,500,	City of Frederick, Md., 4 per cent. bonds...	41,110 00
25,000,	City of Petersburg, Va., 5 per cent. bonds...	26,500 00
25,000,	City of Richmond, Va., 4 per cent. bonds...	25,000 00
10,500,	City of Rockville, Md., 4 per cent. bonds...	10,500 00
30,000,	Lucas county, Ohio, court-house, 4 per cent. bds.....	30,000 00
106		
100,000,	Baltimore Traction Co. bonds, (N. B. division) 1st 5's.....	115,000 00
48,000,	City & Suburban Railway Co. of Baltimore, bonds, 1st 5's.....	54,240 00
41,000,	Virginia Midland R. R. Co., 6 per cent. bonds.	47,420 00
25,000,	Charlotte, Columbia & Augusta R. R. Co., 5 per cent. bonds.....	26,750 00
10,000,	Petersburg R. R. Co., class "B" 6 per cent. bonds.....	11,400 00
11,000,	Georgia Pacific R. R. Co., 6 per cent. bonds.	12,980 00
30,000,	Raleigh & Gaston R. R. Co., 5 per cent. bonds.....	30,000 00

50,000.	Wilmington & Weldon R. R. Co., 5 per cent. bonds	58,000 00
50,000.	Ohio & Mississippi R. R. ext. 4's	52,500 00
	Agents' debit balances, less commissions	128,728 87
	Premiums in course of collection (home office)	8,590 48
	Cash in office and banks	179,697 79
		$2,603,227 14

LIABILITIES.

Capital stock (paid in)	$1,000,000 00
Surplus	1,000,000 00
Premium reserve requirement	510,045 61
Claims adjusted (checks out)	1,862 09
Claims in process of adjustment	16,160 94
Claims reported, but proof not filed, etc	14,104 38
Undivided profits	61,154 12
	$2,603,327 14

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I, Herman E. Bosler, treasurer of the Fidelity and Deposit Company of Maryland, do hereby certify that the aforegoing is a true statement of the assets and liabilities of said company as of September 30th, 1898, taken from the books and records of said company.

In testimony whereof, I hereunto subscribe my name and affix the seal of said company this 30th day of November, A. D. 1898.

H. E. BOSLER, *Treasurer.*

107 STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 30th day of November, A. D. 1898, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Herman E. Bosler, treasurer of the Fidelity and Deposit Company of Maryland, to me personally known, and being by me duly sworn, deposeth and saith that he is the said officer of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company; and that the foregoing is a true statement of the assets and liabilities of said company at the close of business September 30th, 1898, taken from the books and records of said company; and that said company has not since said 30th day of September, 1898, sustained any losses affecting its financial condition.

In testimony whereof I have hereunto set my hand and affixed my official seal at the city of Baltimore this 30th day of November, 1898.

[SEAL.]

FRED. S. AXTELL,
Notary Public.

Whereas, the Fidelity and Deposit Co. of Maryland, a corporation duly incorporated under the laws of the State of Maryland, has appointed an agent as required by section 2 of the act of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has deposited with me its charter or articles of incorporation and the statement required by section 3 of said act; and has satisfied me that it has authority under said charter to do the business provided for in said act, that it has a paid-up capital of not less than $250,000.00 in cash or its equivalent, and that — is able to keep and perform its contract.

Now, therefore, the requirements of said act preliminary to the transaction of business thereunder in the above, and all other particulars, having been fully complied with, the said Fidelity and Deposit Co. of Maryland is hereby granted authority to do business under said act.

[SEAL.] RICHARD OLNEY,
Attorney General.

Department of Justice, Washington, D. C., August 28, 1894.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *July* 21, 1898.

108 The annexed is a true copy of an original authorization to do business, issued by the Attorney General under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] C. B. SORNBERGER,
Acting Chief Clerk.

Endorsed: Bond approved. Nathan Goff, U. S. circuit judge, fourth circuit.

Endorsed: Filed in this office Dec. 7, 1898. Sam'l L. Trogdon, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Postal Telegraph-Cable Company, plaintiff, and The Southern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,

ctly and openly, you send the record and proceedings afore-
with all things concerning the same, to the United States cir-
ourt of appeals for the fourth circuit, together with this writ,
ai you have the same at Richmond, on the thirtieth day of
nber, 1898, in the said circuit court of appeals, to be then and
held, that the record and proceedings aforesaid being inspected,
the said circuit court of appeals may cause further to be done
therein to correct that error, what of right and according to
the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller,
of the Court. Chief Justice of our Supreme Court, the third day of December, in the year of our Lord one thousand eight hundred and ni*h*ety-eight.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals,
Fourth Circuit.

lowed by—
NATHAN GOFF,
U. S. Circuit Judge.

ed in this office Dec. 7, 1898.
SAM'L L. TROGDON, *Clerk.*

Citation.

ED STATES OF AMERICA, *ss:*

President of the United States to the Postal Telegraph-Cable
mpany, Greeting:

ou are hereby cited and admonished to be and appear at a
ed States circuit court of appeals for the fourth circuit, to be
en at Richmond on the thirtieth day of December, 1898, pur-
t to a writ of error filed in the clerk's office of the circuit court
e United States for the western district of North Carolina,
rein The Southern Railway Company is plaintiff in error and
are defendant in error, to show cause, if any there be, why
udgment rendered against the said plaintiff in error, as in the
writ of error mentioned, should not be corrected, and why
dy justice should not be done to the parties in that behalf.
itness the Honorable Nathan Goff, one of the judges of the said
it court of the United States, this thirtieth day of November,
e year of our Lord one thousand eight hundred and ninety-
t.

NATHAN GOFF,
U. S. Circuit Judge, Fourth Circuit.

ue and legal notice of the within citation is hereby acknowl-
d this November 30th, 1898.
POSTAL TELEGRAPH-CABLE CO.,
By J. R. McINTOSH, *Counsel.*

110 *Order to Transmit Record.*

UNITED STATES OF AMERICA, }
Western District of No. Ca. }

In the Circuit Court, Fourth Circuit, at Greensboro.

And thereupon, it *is* ordered by the court here that a transcript of the record and proceedings in the case of Postal Telegraph-Cable Company *vs.* The Southern Railway Company, together with all things thereunto relating, be transmitted to the said circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Test: SAM'L L. TROGDON, *Clerk.*

Clerk's Certificate.

I, S. L. Trogdon, clerk of the circuit court of the United States for the western district of North Carolina, at Greensboro, in said district, do hereby certify that the foregoing is a true, full, and complete transcript of the record and proceedings in the case of The Postal Telegraph-Cable Company *vs.* The Southern Railway Company, as fully as appears from the original papers and records in this office.

Seal of the Court.

In testimony whereof, I have hereunto set my hand and affix- the seal of said court at office in the city of Greensboro, in said district, on this the 7th day of December, A. D. 1898.

SAM'L L. TROGDON,
Clerk of the said Circuit Court.

111 On the same day, to wit, December 8, 1898, the appearance of Stiles and Holladay, Esquires, and F. H. Busbee, Esquire, is entered for the plaintiff in error, and the appearance of J. R. McIntosh, Esquire, is entered for the defendant in error.

Afterwards, to wit, on the 6th day of February, 1899, the defendant in error, by its attorney aforesaid, filed in our circuit court of appeals here the following motion to dismiss, to wit:

Motion to Dismiss Appeal.

Filed February 6, 1899.

United States Circuit Court of Appeals, Fourth Circuit.

SOUTHERN RAILWAY COMPANY }
against
POSTAL TELEGRAPH-CABLE COMPANY. }

And now comes the appellee, The Postal Telegraph-Cable Company, by J. R. McIntosh, counsel, and moves the court to dismiss, for the reasons hereinafter stated, the appeal herein of the 29th day

nber, 1898, taken by The Southern Railway Company, ap-
from the orders of November the 9th, 1898, and other orders
ircuit court of the United States for the district of North
, to which exceptions were taken by appellant and assigned
, namely:

ause this court has no jurisdiction of this cause.

ause the order of his honor Charles H. Simonton, to which
of error was taken, was not a final order or judgment.

ause the writ of error in this cause was improvidently
by his honor Nathan Goff, as circuit court judge, and erro-
eously directed to the judges of the circuit court, not to the
ircuit court in which his honor Judge Simonton then pre-
ided.

ause the citation in said cause was improperly signed by
or Judge Goff.

ause his honor Judge Simonton had previously overruled
ied the application of plaintiff in error for a writ of error in
ise.

cause the case being a special proceeding for a condemna-
right of way for and by the defendant in error along and
e right of way of the plaintiff in error, *in* the exercise of the
eminent domain in the State of North Carolina, under and
e of the statutes of said State, was wholly and exclusively
the sovereign power and jurisdiction of said State, and was
ject to removal from the State court of North Carolina, in
aid proceeding was instituted, to the Federal court.

ecause, if removable at all, it was prematurely removed, inas-
s the State court had exclusive jurisdiction to determine the
defendant in error to the proceeding, and the Federal court
ake jurisdiction, if at all, alone to adjudicate the amount of
s to which the plaintiff in error was entitled from defendant
r.

ecause the matter in dispute does not exceed in value the
$2,000, including interest and costs, the plaintiff in error
ntitled in the law to only nominal damages from the defend-
error, which was so determine- by the superior court of Guil-
unty, North Carolina, in which the proceeding was instituted
defendant in error, that fact appearing from the pleadings
ause.

ecause there is no error upon the face of the record of which
intiff in error can complain.

——— ———,
Counsel for Appellee.

As counsel for the appellant in the above-styled cause, we
acknowledge service of the above notice on this 6th day of
ry, 1899, without waiver of any rights.

STILES & HOLLADAY.

he February term, 1899, of our said circuit court of appeals,
on the 18th day of February, 1899, the said cause came on

be heard, and was argued generally by counsel as well as upon he transcript of the record as upon the motion to dismiss.

Afterwards, at the same term, to wit, on the 30th day of March, 899, the court here announced and filed its opinion, which is as ollows, to wit:

Opinion.

14 United States Circuit Court of Appeals, Fourth Circuit.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* THE POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.	No. 298. Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Motion by defendant in error to dismiss.

(Argued Feb. 18, 1899; decided March 30, 1899.)

Before Goff, circuit judge, and Morris and Brawley, district judges.

Robert Stiles, A. L. Holladay, F. H. Busbee, for plaintiff in error
. R. McIntosh, for the defendant in error.

Statement.

On June 11, 1898, the Postal Telegraph-Cable Company, a corporation of New York, filed in the office of the clerk of the superior ourt of Guilford county, North Carolina, a petition, making The outhern Railway Company the sole defendant, to obtain by condemnation the right to construct, maintain and operate a
15 telegraph line along and upon the right of way of the Southern Railway Company from a point on the State line between the States of North Carolina and Virginia south to Charlotte, nd from Greensboro, in Guilford county, to the city of Raleigh, assing through the intervening counties, the whole distance being bout 193 miles.

This petition was filed under the provisions of article 49 of the ode of North Carolina of 1883, and under sections 2007 to 2013, hich provide that any telegraph company, incorporated in North arolina or any other State, shall have the right to construct, maintain and operate lines of telegraph along any railroad in that State, o be so constructed and maintained as not to obstruct or hinder he usual travel on said railroad, upon making just compensation herefor, and further providing in what manner proceedings for ondemning such a right should be conducted.

The Southern Railway Company, a corporation of Virginia, appeared and filed its petition for removal on the ground of diverse itizenship, and such proceedings were had that the case was removed into the circuit court of the United States for the western istrict of North Carolina. (Opinion of Judge Simonton, 88 Fed. Rep., 303.)

lway company resisted the proceedings upon various nong others, that there was then no law in North Caro- ding for the condemnation of land or rights of way for elegraph companies, that if there was such a law, the the telegraph company did not in essential particulars nd that the petition was too vague and uncertain in its f the nature of the tenure by which the railroad com- the right of way over which the easement for the tele- pany was sought to be condemned. These objections uled (opinion of Judge Simonton, 89 Fed. Rep., 190), and ordered on September 15, 1898, as provided by section e North Carolina Code of 1883, that three commissioners ed to assess the damages which the railway would sus- son of the erection of the petitioner's telegraph line it r proposed, and that they should hear the testimony and r award in writing, and file it with the clerk of the t.

ubsequently, upon the petition of the railway company eave to answer the original petition, leave was granted he order for the appointment of the commissioners was

The answer was filed, setting up much the same objec- had already been passed upon, with the additional allega- t that the railway company's right of way was in some arrow that to erect a telegraph line upon it as proposed tion would imperil the safe operation of the railroad and hinder the usual travel upon it, and that condemnation s must be instituted in each and every county in which land used by the railroad company for its line is owned . To this answer the telegraph company demurred, and sustained the demurrer (opinion of Judge Simonton, 90 30), and by its order of October 24, 1898, reinstated the inting commissioners. To the granting of these orders company has sued out a writ of error to bring the case view.

graph company moves to dismiss the writ of error as providently to an order which was interlocutory and

Opinion.

istrict Judge:

that a writ of error or appeal does not lie except to a ment which determines the controversy between the o conclusively settled that the burden is upon the plain- or to show that this is a case to which that general rule pply.

tention of the plaintiff in error is that it is not appealing rder of appointing commissioners, but from the action of elow in refusing to allow it to introduce testimony to contention that the proposed telegraph line could not be ted and operated as not to obstruct and hinder the usual n the railroad.

s contention is that in an adversary proceeding in court for con-
nation there are two separate and successive proceedings, the
first of which determines the right to condemn, and the second
the amount of compensation; and that the first of these, even
when the right to condemn is sustained, is a final and appeal-
judgment, although not made so by statute.

here can be found no case in the decisions of the Supreme Court
he United States which has so held. In the case of *Belmont*
dge vs. Wheeling Bridge, 138 U. S., 287, the Supreme Court did
d that the judgment in that case for the condemnation was a
l appealable judgment, but this was solely upon the ground that
case came to the Supreme Court by writ of error to the supreme
rt of appeals of West Virginia, and that it had been held by that
rt that the judgment was final under the West Virginia statute.
Justice Field said: "The judgment appears to have been con-
ered as so far final as to justify an appeal from it; and if the
reme court of a State holds a judgment of an inferior court of
State to be final, we can hardly consider it in any other light in
rcising an appellate jurisdiction."

n *Luxton vs. North River Bridge Co.*, 147 U. S., 337–342, Mr. Jus-
Gray, commenting on the ruling in the case just above quoted,
l: "To have held otherwise might have wholly defeated the
ellate jurisdiction of this court under the Constitution and laws
the United States; for if the highest court of the State held the
er appointing commissioners to be final and conclusive unless
ealed from, and the validity of the condemnation not to be open
a subsequent appeal from the award of damages, it is difficult to
how this court could have reached the question of the validity
he condemnation except by writ of error to the order appointing
nmissioners. That case, therefore, affords no precedent or reason
sustaining this writ of error to the circuit court of the United
tes."

Even if the fact was pertinent, in condemnation proceedings
der the provisions of the State law when conducted in a circuit
rt of the United States, that the State court had held the appoint-
nt of commissioners to be a final appealable order, the plaintiff
error cannot have the benefit of such a contention in the present
e, for the reason that the supreme court of North Carolina has
decided to the contrary with respect to the very statute under
which these proceedings were taken. In *American Union*
Telegraph Company vs. Wilmington, &c., Railroad Company,
N. C., 420, the supreme court of North Carolina held, in a similiar
ceeding to condemn a right of way for the construction and
eration of lines of telegraph along the defendant's railroad, that
appeal was allowable from the order adjudging that the petitioner
s entitled to the right of way demanded and appointing commis-
ners to ascertain and report the compensation to be paid to the
fendant railroad as damages for the condemned property. The
rt said: "Upon a careful examination of the statute, and the por-
ns of the act of February 8, 1872, by reference incorporated with
and regarding the policy indicated in both to favor the construc-

completion of such works of internal improvement,
ing upon the same footing as railroad corporations,
ion it was not intended in these enactments to arrest
gs authorized by them at any intermediate stage, and
s only from a final judgment. Then and not before
r committed during the progress of the cause and
ect of exception at the time be reviewed and corrected
te court, and an appeal from an interlocutory order is
l unauthorized.".

vs. Railroad, 98 N. C., 431, the supreme court of
a again held that under the law of that State the order
mmissioners to assess damages is interlocutory, and no
entertained until after final judgment upon the report
sioners, and said: "This case is in all material respects
Co. vs. The R. R. Co., 83 N. C., 420; *Commissioners vs.*
, 18; *Railroad vs. Warren*, 92 N. C., 620. They settle
practice in such proceedings as the present one and
ate the reasons for it."

Luxton vs. North River Bridge Co., 147 U. S., 337–341,
s, we think, conclusive of the present question, for in
as held by the Supreme Court of the United States that
proceedings in the circuit court of the United States
by the act of Congress to be according to the laws of
hin which the land to be condemned was located, and
t State law the appointment of the commissioners
be reviewed by the supreme court of the State on writ
iorari, yet so much of the State law as allowed such
applicable to a proceeding in the circuit court of the
s. The court said: "The case throughout, from the
the corporation for the appointment of commissioners
ages to the owner of the land proposed to be taken,
nt upon the award of the commissioners or upon ver-
, assessing those damages, remains in the circuit court
l States and under its supervision and control. The
t court in this case, as in other cases on the common-
not reviewable by this court by writ of certiorari.
vs. Young, 94 U. S., 258; but only by writ of error,
ot lie until after judgment disposing of the whole case
ting all the rights, whether of title or of damages, in-
e transaction. The case is not to be sent up in frag-
cessive writs of error.
tember 24, 1789, ch. 20, sec. 22, 1 Stat. 84. Rev Stat.,

rford vs. Fisher, 4 Dall., 22.
mbe vs. McKusick, 20 How., 552, 554.
ana Bank vs. Whitney, 121 U. S., 284.
ne Co. vs. Martin, 132 U. S., 91.
urkey vs. Toledo & Ohio Railway, 146 U. S., 536."

or dismissed for want of jurisdiction.

03

Afterwards, at the same term, to wit, on the 31st day of March, 1899, the court here made and entered the following nt, to wit:

Judgment.

nited States Circuit Court of Appeals, Fourth Circuit.

THERN RAILWAY COMPANY, Plaintiff in Error,
vs.
TELEGRAPH-CABLE COMPANY, Defendant in Error. } No. 298.

the circuit court of the United States for the western district of North Carolina, at Greensboro.

cause having been called in the regular order for argument defendant in error having moved the court to dismiss the error, the said cause was argued generally, by counsel, on nscript of the record as well as upon the motion to dismiss. onsideration whereof, the court being of opinion that there final judgment of the said circuit court in this cause from writ of error could lie, it is now here ordered and adjudged court that the writ of error sued out in this cause be, and e is hereby, dismissed with costs.
andate issue.
h 31, 1899.

NATHAN GOFF.

thereupon, afterwards, to wit, on the 1st day of April, 1899, ndate of the said circuit court of appeals was issued and ransmitted to the said circuit court of the United States for he western district of North Carolina, at Greensboro; which aid mandate is as follows, to wit:

Mandate.

STATES OF AMERICA, *ss:*

esident of the United States of America to the honorable udges of the circuit court of the United States for the western ct of North Carolina, Greeting:

reas lately, in the circuit court of the United States for the district of North Carolina, before you or some of you, in a etween The Postal Telegraph-Cable Company, complainant, e Southern Railway Company, defendant, wherein the de- nd orders of the said circuit court entered in the said cause gust 31, 1898; September 15, 1898; September 19, 1898; r 24, 1898, and October 24, 1898, are in the words following.

cause came before me, at Asheville, to be heard on the pe- emoved into this court and demurrer thereon, it is ordered, ed and decreed, that the demurrer be overruled.

It is ordere Greensboro, N competent freel before him. T sioners to asses may sustain b the stretching Company, as p That the said oath prescribed shall proceed i such damages, be just for sa premises. The court-house of which 122 thorized to the sa they may deen to the benefit t to it. The fir clerk shall giv ten days after parties to this their conclusio to writing and of this court a

The defenda

That pursua ton, on the 1 above-entitled disinterested f the said South of the construc the plaintiff, T the assembling bearing upon pointed as con Walker, and J upon whom se them to appea room of the U 30th, 1898, at notice and be

Done this 1 seal of this co

[SEAL.]

123 This leave o notice and m

hat S. L. Trogdon, Esq., clerk of this court at
Carolina, do appoint three disinterested and
lers resident in this district, and summons them
the said persons so selected shall act as commis-
e damages which the Southern Railway Company
eason of the erection of the telegraph poles and
the wires thereon of the Postal-Telegraph Cable
osed in the petition of said company to this court.
mmissioners shall take before the said clerk the
section 1946 of the Code of North Carolina, and
ll respects as required in said code in assessing
imating and assessing such compensation as may
Southern Railway Company by reason of the
id commissioners shall hold their meetings in the
United States, in the city of Greensboro, over
tings said clerk shall preside, and they are au-
nd empowered to take such testimony in respect
damages to the said Southern Railway Company as
ertinent, not, however, extending their inquiry as
derived to the telegraph Co., or the value thereof,
meeting of the commissioners, of which the said
ne notice to them and to the parties, shall be held
ice of their appointment has been served on the
use. After hearing the evidence and reaching
the said commissioners shall reduce their award
n and seal the same and file it with the said clerk
reensboro.

The Southern Railway Co., hereby take notice:
to an order made by his honor Chas. H. Simon-
day of September, 1898, to me directed in the
se, commanding me to appoint and summons three
nolders as commissioners to assess the damage of
Railway Co., which may accrue to same by reason
n of a line of telegraph along the right of way by
Postal Telegraph-Cable Co., and to fix a time for
said commissioners, and the taking of testimony
issues by them to be tried; I have this day ap-
ssioners in said cause Alfred M. Scales, John M.
ddison Hodgin, residents of Guilford county, N. C.,
ce of summons has this day been had, requiring
nd sit upon the hearing of said cause in the court-
circuit court in Greensboro, N. C., on September
o'clock a. m. Of such proceedings you will take
verned accordingly.
day of September, 1898, as witness my hand and

SAM'L L. TROGDON, *Clerk.*

came the defendant railway company and by
urt filed its answer to the complainant's written
n, to which said answer the plaintiff telegraph

company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court.

It is therefore ordered, that the former order made by this court, directing the clerk of this court at Greensboro, North Carolina, to appoint commissioners to assess the damages in the above-entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts.

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, commissioners in the above-entitled case:

You are hereby summoned and directed to appear and be in the court in the U. S. building, at Greensboro, N. C., on November 3rd, 1898, at 10 o'clock a. m., at which time and place a hearing will be had by you for the purpose expressed in the order of his honor Charles H. Simonton authorizing your appointment and in the notice heretofore served on you.

Witness my hand and seal of this court October 24, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fourth circuit by virtue of the writ of error sued out by the Southern Railway Company, agreeable to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the term of February, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said United States circuit court of appeals for the fourth circuit on the said transcript of record, and having been called in the regular order for argument, and the de-
124 fendant in error having moved the court to dismiss the writ of error, the said cause was argued generally by counsel on the transcript of the record as well as upon the motion to dismiss.

On consideration whereof, the court being of opinion that there was no final judgment of the said circuit court in this cause from which a writ of error could lie, it is now here ordered and adjudged by this court that the writ of error sued out in this cause be, and the same is hereby, dismissed with costs.

Let mandate issue.

NATHAN GOFF.

March 31, 1899.

You, therefore, are hereby commanded that such further proceedings be had in said cause by way of execution as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the first day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of Defendant in Error.

Clerk	$15.80
Attorney	20.00
	$35.80

Afterwards, to wit, on the third day of May, 1899, the Southern Railway Company, by its attorneys, filed its petition for a writ of error, together with an assignment of errors, which are as follows:

Petition for Writ of Error.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

125 SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, The Southern Railway Company, respectfully represents that it is the sole defendant in a condemnation proceeding instituted in the superior court of Guilford county, North Carolina, by the Postal Telegraph-Cable Company against the Southern Railway Company, which was removed from said State court to the circuit court of the United States for the western district of North Carolina, and was brought by your petitioner from the last-named court to this honorable court by writ of error and placed on the docket of this court under the style of Southern Railway Company, plaintiff in error, against Postal Telegraph-Cable Company, defendant in error.

2. Your petitioner conceiving itself aggrieved by the order made herein by said circuit court of appeals on the 31 day of March, 1899, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by the order of the circuit court of the United States made herein on the 24th day of October, 1898, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by two orders made by said circuit court dated August 31, 1898, and September 15, 1898, and by two orders of the clerk of said circuit court, at Greensboro, dated, respectively, September 15, 1898, and October 24, 1898,

does hereby appeal from said order of said circuit court of appeals dated March 31st, 1899, and said order of said circuit court dated October 24, 1898 (and all of the above-recite l orders of said circuit court and of the clerk thereof), to the Supreme Court of the
126 United States for the reasons set out and specified in the assignment of errors filed herewith, and your petitioner prays that a writ of error and supersedeas may be allowed it in respect to all of the aforesaid recited orders, including the order made by said circuit court of appeals, the several orders made by said circuit court, and the several orders made by the clerk of said circuit court; that a transcript of the record upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, that said order of said circuit court of appeals dated March 31st, 1899, and said order of said circuit court dated October 24, 1898, and all other orders made by said circuit court and by the clerk of said circuit court may be reviewed and reversed by the Supreme Court of the United States.

3. And your petitioner prays for such other, further, and general relief as may be proper in matters of this character.

And your petitioner will ever pray, &c.

SOUTHERN RAILWAY CO.,
By STILES & HOLLADAY,
As Its Counsel.

Assignment of Errors.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.

Assignment of errors.

Assignment of errors filed by the Southern Railway Com-
127 pany with its petition for a writ of error to an order made by the United States circuit court of appeals for the fourth circuit in the cause of Southern Railway Company, plaintiff in error, against Postal Telegraph-Cable Company, defendant in error, on the 31st day of March, 1899, and to an order of the circuit court of the United States for the western district of North Carolina on October 24th, 1898, in said suit, which was then depending in said circuit court under the style of Postal Telegraph-Cable Company against Southern Railway Company.

And now, on this the — day of May, 1899, came the petitioner, The Southern Railway Company, by Stiles & Holladay, its attorneys, and says that the orders entered in this suit, to wit, said order entered by said circuit court of appeals dated March 31, 1899, and the orders entered by said circuit court dated August 31, 1898; Septem-

ber 15, 1898, and October 24, 1898, and the orders entered by the clerk of said circuit court dated September 19, 1898, and October 24, 1898, are erroneous and against the right of your petitioner, and your petitioner, The Southern Railway Company, assigns for error and will contend in the Supreme Court of the United States that said circuit court of appeals and said circuit court erred as follows:

First.

1. That said circuit court of appeals erred in its order of March 31, 1899, in holding and deciding that the order of said circuit court dated October 24, 1898, was an interlocutory order, and erred in dismissing the writ of error and supersedeas allowed by said circuit court on November 29, 1898. A copy of the order of said circuit court allowing said writ of error and supersedeas will be found at pages 95, 96 of the printed record (used in said circuit court of appeals).

That said circuit court of appeals should have held and decided that said order of October 24, 1898, a copy of which will be
128 found at pages 69, 70 of said printed record, was a final order.

2. That said circuit court of appeals erred in failing to hold that the order of said circuit court of August 31, 1898, overruling your petitioner's motion to dismiss the several petitions of the Postal Telegraph-Cable Company filed in this cause, for that said petition of said Postal Telegraph-Cable Company did not state facts and grounds sufficient to constitute a cause of action, was erroneous. Said circuit court of appeals should have reversed said circuit court and sustained your petitioner's motion to dismiss all of said petitions of said Postal Telegraph-Cable Company for the reasons written out and numbered from 1 to 16, inclusive, to be found at pages 96 to 101, inclusive, of said printed record in a paper marked "Stipulations of counsel;" which said records, numbered from 1 to 16, inclusive, are prayed to be taken, treated, and read as a part of this assignment of errors as if here set out and again repeated at full length.

Second.

The appellant, The Southern Railway Company, further submits and will contend in the appellate court that the order of the circuit court herein dated September 15, 1898, was erroneous and should be reversed for the sixteen reasons above assigned as error committed by the circuit court in its order overruling your petitioner's motion to dismiss the plaintiff's petitions because they failed to state facts and grounds constituting a cause of action, and also because said order of September 15, 1898, was prematurely entered and without notice to your petitioner, and because neither said order of September 15, 1898, nor the powers, duties, and proceedings of the commissioners thereby directed to be appointed, as set out in said order, were authorized by law, and also because the
129 court, in the entry of said order, erred in directing its clerk to appoint commissioners to assess damages, as therein set

out, and erred in prescribing the oath to be taken by said commissioners, and in directing the mode of procedure and the principles and rules by which said commissioners should be governed, and erred in fixing the place for the sessions of said commissioners and how they shall be presided over and the elements to be considered by them and the form and substance of their report; and your petitioner submits and will contend in the Supreme Court of the United States that said circuit court of appeals should have reversed said circuit court and should have held that said circuit court erred in each, all, and every of the particulars set out in this paragraph.

Third.

The appellant, The Southern Railway Company, further submits and will insist in the appellate court that the order herein of September 19, 1898, made by Samuel L. Trogdon, clerk of said circuit court, was erroneous and should be reversed because the said clerk had no lawful authority to make said order and because said order was erroneous for the same reasons above set out in respect to the circuit court's aforesaid order of September 15, 1898; and your petitioner will submit and contend in the Supreme Court of the United States that said circuit court of appeals should have reversed said circuit court and the clerk thereof and said order made by said clerk dated September 19, 1898, and should have held that said circuit court and said clerk erred in each, all, and every of the particulars set out in this paragraph.

Fourth.

The appellant, The Southern Railway Company, submits and will insist in the appellate court that the order of said circuit
130 court herein of October 24, 1898, sustaining the plaintiff's demurrer to defendant's answer, refusing to allow your petitioner to introduce evidence in support of the allegations of its answer and otherwise ordering as therein ordered, was erroneous and should be reversed for all of the reasons above assigned for reversing the orders of said circuit court dated August 31, 1898, and September 15, 1898; and, further, because the circuit court by said order of October 24, 1898, refused to hear the proofs of your petitioner and decided against your petitioner without giving it an opportunity to introduce its proofs and be heard, and said circuit court erred in not holding that your petitioner's answer set up a complete defense. Said circuit court should have given your petitioner an opportunity to be heard, should have heard the proofs of your petitioner, and should have held that each of the grounds of defense set up in its said answer (which said grounds are prayed to be treated and considered as if here again inserted at full length) constitute a full and complete defense to the plaintiff's petitions and required their dismissal by the court, and for the reasons aforesaid said circuit court erred in reinstating the aforesaid order of said circuit court dated September 15, 1898, and in directing the clerk of said circuit court to fix a day for the meeting of the com-

ers appointed by him, and your petitioner will submit and
in the Supreme Court of the United States that said circuit
appeals should have reversed said circuit court, and should
ld that said circuit court erred in each, all, and every of the
lars set out in this paragraph.

Fifth.

ppellant will also submit and insist in the appellate court
e order made by Samuel L. Trogdon, clerk of said court,
lated October 24, 1898, was erroneous and should be reversed
or the reasons above assigned as to his order of September
9, 1898, and your petitioner will submit and contend in the
e Court of the United States that said circuit court of ap-
ould have reversed said circuit court and the clerk thereof,
uld have held that said clerk & circuit court erred in each,
every of the particulars set out in this paragraph.

Sixth.

circuit court of appeals erred in failing to reverse the order
circuit court dated October 24, 1898, for the following rea-
z:

Because said order of October 24, 1898, deprives your peti-
f its property without due process of law, in violation of the
ution of the United States.

Because said order denies to your petitioner the equal pro-
of the laws.

Because said order determines without proof conditions
nt to the condemnation of your petitioner's property.

Because said order refused to hear the proofs of your peti-
as required by section 1945 of the Code of North Carolina.

Because said order refused to permit your petitioner to
ce its proofs and denied to your petitioner an opportunity
eard in its defense.

Because said order refused to hear proofs, and refused to
ur petitioner an opportunity to be heard in its defense, and
t proof determined that the Postal Telegraph-Cable Company
ke possession of and use and exercise dominion and control
e property of your petitioner for the purposes of said tele-
graph company without any further order of said circuit court.

(G.) Because said order, in violation of the Constitution of the United States, delegated to the clerk of said court the of selecting and appointing disinterested freeholders to act as ssioners, and authorized said clerk to preside over said com-
ers.

Because said order delegated to said clerk powers vested in
cuit court of the United States and in said circuit court only.

Seventh.

the foregoing and other reasons appearing upon the face of
resaid orders and proceedings had in this cause, your peti-
prays for a writ of error and supersedeas to said order of said

circuit court of appeals dated March 31, 1899, and said order of said circuit court dated October 24, 1898, and that said two orders and all of the hereinbefore-mentioned orders of said circuit court and its clerk may be reviewed and reversed by the Supreme Court of the United States.

SOUTHERN RAILWAY CO.,
By STILES & HOLLADAY,
As Its Counsel.

Order Allowing Writ of Error.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN RAILWAY COMPANY
vs.
POSTAL TELEGRAPH-CABLE COMPANY.

133 This day came the Southern Railway Company, by Stiles & Holladay, its counsel, and filed its petition, with an assignment of errors thereto attached, praying a writ of error and supersedeas from the Supreme Court of the United States to the United States circuit court of appeals for the fourth circuit as to the order of the latter court made on the 31st day of March, 1899, as prayed in said petition and assignment of errors.

And thereupon it is ordered that a writ of error and supersedeas be, and the same are hereby, allowed said Southern Railway Company as to said order of March 31, 1899, as prayed in said petition and assignment of errors; but said Southern Railway Company, or some one for it, shall within ten days after this day file in the papers of this cause in the clerk's office of this court a bond in the penalty of $5,000.00, as provided by law, with surety to be approved by one of the judges of this circuit.

May 3, 1899.

NATHAN GOFF,
U. S. Circuit Judge, Fourth Circuit.

Writ of Error Bond.

Filed May 5, 1899.

Know all men by these presents that we, Jno. P. Stith, as principal, and the Virginia Trust Company, as sureties, are held and firmly bound unto the Postal Telegraph-Cable Company in the full and just sum of five thousand dollars, to be paid to the said The Postal Telegraph Cable Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a United States circuit court of appeals
r the fourth circuit, in a suit depending in said court be-
ne Southern Railway Company, plaintiff in error, and The
elegraph Cable-Company, defendant in error, a judgment
lered against the said Southern Railway Company, and the
thern Railway Company having obtained a writ of error
l a copy thereof in the clerk's office of the said court to
he judgment in the aforesaid suit, and a citation directed
id The Postal Telegraph-Cable Company, citing and admon-
to be and appear at a Supreme Court of the United States
lden at Washington, on the 13th day of June next:
the condition of this obligation is such that if the said
n Railway Company shall prosecute said writ of error to
d answer all damages and costs if it fail to make its plea
en the above obligation to be void; else to remain in full
d virtue.

JOHN P. STITH. [SEAL.]
VIRGINIA TRUST COMPANY, [SEAL.]
By MANN S. QUARLES, *Vice-Pres't.* [SEAL.]

of Virginia Trust Co.]

l and delivered in presence of—

——.

-cent revenue stamp attached.

oved by—
NATHAN GOFF,
U. S. Circuit Judge.

rsed: Approved May 5, '99. Melville W. Fuller, Chief Jus-
iled May 5, 1899.

Writ of Error.

Filed May 5, 1899.

STATES OF AMERICA, *ss:*

esident of the United States to the honorable the judges of
Jnited Staes circuit court of appeals for the fourth circuit,
ting:

use in the record and proceedings, as also in the rendition of
lgment of a plea which is in the said United States circuit
f appeals, before you or some of you, between The Southern
y Company, plaintiff in error, and The Postal Telegraph-
Company, defendant in error, a manifest error hath happened,
great damage of the said plaintiff in error, as by its complaint
s, we, being willing that error, if any hath been, should be duly
ed and full and speedy justice done to the parties aforesaid in
half, do command you, if judgment be therein given, that
nder your seal, distinctly and openly, you send the record

d proceedings aforesaid, with all things concerning the same, to Supreme Court of the United States, together with this writ, so t you have the same in the said Supreme Court, at Washington, hin 30 days from the date hereof, that, the record and proceed- s aforesaid being inspected, the said Supreme Court may cause ther to be done therein to correct that error what of right and ording to the laws and customs of the United States should be done.

l of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

MELVILLE W. FULLER,
Chief Justice of the United States.

And to operate as a supersedeas on bond approved already by dge Goff.

MELVILLE W. FULLER,
Chief Justice.

[Endorsed:] 298. Writ of error.

6 A copy of said writ of error is lodged in the clerk's office on this May 5, 1899.

HENRY T. MELONEY, *Clerk.*

7 *Citation.*

May 5, 1899.

NITED STATES OF AMERICA, *ss:*

the Postal Telegraph-Cable Company, Greeting:

You are hereby cited and admonished to be and appear at a Su- eme Court of the United States, at Washington, within 30 days om the date hereof, pursuant to a writ of error filed in the clerk's ice of the United States circuit court of appeals for the fourth rcuit, wherein The Southern Railway Company is plaintiff in ror and you are defendant in error, to show cause, if any there be, hy the judgment rendered against the said plaintiff in error, as in e said writ of error mentioned, should not be corrected and why eedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the nited States, this 5th day of May, in the year of our Lord one ousand eight hundred and ninety-nine.

MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] 298. Citation. I acknowledge service of the within ation this May 16, 1899. J. R. McIntosh, counsel for the Postal elegraph-Cable Co.

Order to Transmit Record.

upon it is ordered by the court here that a transcript
l and proceedings in the cause aforesaid, together with
hereunto relating, be transmitted to the Supreme Court
d States; and the same is transmitted accordingly.

HENRY T. MELONEY, *Clerk.*

Clerk's Certificate.

ATES OF AMERICA, *ss:*

T. Meloney, clerk of the United States circuit court of
he fourth circuit, do certify that the aforegoing is a true
f the record and proceedings in the therein-entitled cause
remains upon the records and filed of the said circuit
peals.

l States Cir-
t of Appeals,
ircuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, on this 18th day of May, A. D. 1899.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

on cover: File No., 17,417. U. S. C. C. of appeals, 4th
rm No., 303. The Southern Railway Company, plaintiff
The Postal Telegraph-Cable Company. Filed May 22,

892. 803

Office Supreme Court U. S.
FILED
MAY 22 1899
JAMES H. McKENNEY,
Clerk.

IN THE

preme Court of the United States.

OCTOBER TERM, 1898.

No. 892.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

HE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals,
Fourth District.

sons why the Defendant's Motion to Dismiss or Modify the Writ should not Now be Heard.

ROBERT STILES, RICHMOND, VA.,
ADDISON L. HOLLADAY, RICHMOND, VA.,
Of Counsel for Plaintiff in Error.

Supre

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Error

Reasons A
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IN THE

e Court of the United States.

OCTOBER TERM, 1898.

No. ——

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

TAL TELEGRAPH-CABLE COMPANY,
Defendant in Error.

**the United States Circuit Court of Appeals,
Fourth District.**

**gned by the Plaintiff in Error why the Motion
fendant in Error to Dismiss the Writ of
or to Modify the Supersedeas hereto-
ore Granted Should Not be Now
Heard.**

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vill permit us to say, at the outset, that the paper
is not in any proper sense *a brief* in opposition
of the defendant in error. Not only would it
as hereinbelow more fully set forth, to produce
rief within the time when, according to notice,

the motion to dismiss will be made and pressed; but the effort—necessarily vain—to produce and to submit such brief might, under the law and practice of the Court, be taken as a *waiver* of the position, upon which we confidently rely, that no discussion of the merits of the motion will be at present expected or required of the plaintiff in error, and that the Court will not consider the motion, until full opportunity shall be accorded him to prepare and submit his defense thereto.

INSUFFICIENT NOTICE.

On Thursday, the 18th day of May, 1899, the following notice was served by the Marshal upon the counsel for the plaintiff in error—a telegram containing in brief the same information having been left at the office of said counsel late the preceding evening:

(Copy of First Notice.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

THE SOUTHERN RAILWAY COMPANY, Appellant,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Motion to dismiss Writ of Error or for Modification of Supersedeas on said Writ.

Messrs. STILES & HOLLIDAY,

Attorneys for Southern Railway Co., Appellant,

Richmond, Va.

You are hereby notified that in the Supreme Court of the United States of America, at Washington, D. C., on Monday, the 22nd day of May, 1899, at 12 o'clock M., or as soon thereafter as counsel can be heard, The Postal Telegraph-Cable Company, Appellee in this action, by its attorney, will move the said court to dismiss the writ of error heretofore granted by the Honorable Chief Justice of the United States, and in

the event the motion to dismiss should be refused, then to modify the supersedeas granted with the said writ, at which time and place you may appear if you see proper, and oppose the same.

[Signed] J. R. McINTOSH.

Counsel for The Postal Telegraph-Cable Company, Appellee.

May 17th, 1899.

At 10.55 A. M. on Friday, May 19, 1899, the following notice, containing, it will be observed, no designation of the time when the motion will be submitted—was left at the office of counsel for the plaintiff in error, by a messenger from the counsel whose name is signed to the motion, and, with this notice, was served a copy of the brief of said counsel, in support of said motion:

(Copy of Second Notice.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. ——.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error,

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH DISTRICT.

Motion by the Defendant in Error to Dismiss..

Now comes the defendant in error, The Postal Telegraph-Cable Company, by J. R. McIntosh, Counsel, and moves the court to dismiss the writ of error in this cause, (1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then, that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the

writ, it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon, pending said writ of error.

[Signed] J. R. McINTOSH,
Counsel for Motion.

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond, in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error from the Circuit Court to the Circuit Court of Appeals to operate as a supersedeas—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a supersedeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein. The three last mentioned papers were duly filed in the Clerk's office of the Circuit Court of Appeals at Richmond, Virginia, on May 6th, 1899, together with copies of said writ of error and citation. A copy of Judge Goff's said order of May 4th, 1899, and the original form of writ of error and citation signed by him are filed in the Clerk's office of this court.

The record from the Circuit Court of Appeals for the Fourth Circuit did not reach the Clerk's office of this court until Saturday, May 20th, 1899, and has not yet been printed.

Upon this state of facts, we submit:

FIRST.

The notice thus served was not sufficient to afford the plaintiff in error opportunity for preparing and printing a proper brief in the premises.

Even if it were possible for counsel to abandon all other engagements and to concentrate every energy upon the preparation of such a brief, it would not be practicable to prepare and print it in the time given, especially in a case of such complexity and difficulty, as a glance at the record will demonstrate the case at bar to be.

SECOND.

The notice thus served was not all that might and should have been given by the defendant in error, after he was aware of the granting of the writ of error and supersedeas.

The order allowing the writ of error and supersedeas was entered May 4, 1899, the writ was awarded on the 5th, and the defendant in error was aware of its issue on the 6th instant; yet the first intimation which the plaintiff in error received of any disposition to contest the matter, or to move the dismissal or modification of the writ, was nearly twelve days later, *i. e.*, on the evening of the 17th of May. We submit that the *laches* of the defendant in error, in failing to give prompt notice of his intended motion, ought not to result in depriving the plaintiff in error of his right to sufficient time to prepare to resist the motion.

THIRD.

The notice thus served fails to comply with the regulations and requirements of this Honorable Court in the premises, to be found in Paragraph 4, of Rule 6, with regard to "Motions." The paragraph referred to is as follows:

"RULE 6, MOTIONS.

* * * * * * *

"4. WHEN TO BE SUBMITTED.—All motions to dismiss writs of error and appeals, except motions to docket and dismiss

under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days."

* * * * * * *

It is perhaps unnecessary to remark that the wide application and great importance of this rule are strongly and repeatedly emphasized in its phraseology. It applies to "all motions to dismiss appeals and writs of error," with a single exception under which the case at bar does not fall:—it requires that notice of the motion be served "at least three weeks before the time fixed for submitting the motion;" and this, "in all cases," with the exception of one specific case, in which "the notice shall be at least thirty days."

We submit that the notice in the case at bar is inevitably condemned by this rule as *illegal* and *insufficient;* and, furthermore, that this honorable court will never, without a hearing and substantially without notice, vacate, as improvidently awarded, a writ which was granted by a Circuit Judge of the highest intelligence, not upon a mere perfunctory, *ex parte*, inspection of the record, but after elaborate and repeated discussions of the case before him, and that, upon the very points covered by the pending motion.

Upon the basis hereinabove laid, we respectfully ask the postponement of the hearing to a future day—in order to afford the plaintiff in error time for preparation and full response to the brief submitted by the defendant in error in support of his motion.

And, if it be suggested, as it has been suggested by the de-

ndant in error in his said brief, that the exigencies of the ublic convenience and accommodation demand prompt action; ay it not be pertinently suggested, in reply, that it might be ell to have some regard, also, to what the public convenience, commodation and safety may require *in the direction of caution d deliberation*, in view of the allegations of the sworn answer the defendant railroad filed in the condemnation proceed- g—that the transcendently important use *for railroad purposes*, which the property in question was originally appropriated, ill be seriously menaced and interfered with by the proposed ondemnation and appropriation of said property *to telegraph rposes*, and also in view of the contention, that there is no atute now in force in North Carolina, by virtue of which ch condemnation and appropriation may lawfully be made.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Of Counsel for Plaintiff in Error.

IN THE

eme Court of the United States.

OCTOBER TERM, 1899.

No. 303.

HE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

---

or to the United States Circuit Court of Appeals Fourth District.

Appellant resisting Motion of Appellee to vacate he Supersedeas upon the Writ of Error from this Court."

STATEMENT OF CASE.

ne 11, 1898, the Postal Telegraph-Cable Company, called the Telegraph Company, a corporation char- der the laws of the State of New York, having accep- provisions of the Act of Congress, approved July 24, itled: "An act to aid in the construction of telegraph

and to secure to the government the use of the same for
l, military and other purposes," filed in the office of the
of the Superior Court of Guilford county, North Caro-
a petition making the Southern Railway Company, here-
er called the Railway Co., the sole defendant, in which
on the Telegraph Company asked the condemnation, for
irposes as a telegraph company, of a continuous right of
along, upon and over the lands (roadway) of the Railway
from a point on the State line between the States of North
lina and Virginia, where said railroad crosses the State
thence south through the counties of Rockingham, Guil-
Randolph, Davidson, Rowan, Cabarras, and Mecklenburg
harlotte, and from the town of Greensboro, in the county
uilford, to the city of Raleigh, passing through the coun-
of Guilford, Alamance, Orange, Durham and Wake, and
n amended petition filed the same day, asked for a like
lemnation from Greensboro, North Carolina, to Winston,
orsythe county, North Carolina—the whole distance being
ly two hundred and fifty miles, and the larger part of the
erty sought to be condemned being situated within the
tern District of North Carolina.

summons was issued requiring the Railway Co. to appear
re the clerk of the Superior Court of Guilford county on
22nd day of June, 1898, and answer.

n the 22nd of June, 1898, the Railway Co. entered a special
earance for that purpose, and filed a petition and bond,
he removal of the proceedings to the Circuit Court of the
ted States for the Western District of North Carolina.
on the same day, said petition and bond were presented to
State Court and application made to it by counsel for the
lway Co. to enter an order removing the cause to the Cir-
Court of the United States; but the State Court denied
application to remove, and made an order requiring the
lway Co. to answer. Thereupon, the Railway Co. procured
anscript of the record from the clerk of the State Court
filed the same in the clerk's office of the Circuit Court of
United States at Greensboro, N. C., on June 25th, 1898.

nt to June 22nd, 1898, the Telegraph Co. sought to
action in the State Court in said proceedings to
nd upon a bill filed by the Railway Co. in the Cir-
of the United States at Greensboro a restraining
ranted prohibiting further prosecution of the cause
Court.

graph Co. moved the Federal Court to remand said
to the State Court, and the Railway Co. moved
Court to continue the restraining order in force,
tion. These motions were argued at Asheville on
14th day of July, 1898, and, on the 20th of July,
urt filed its written opinion:

ng to remand the proceedings to condemn, to the

g that the restraining order must be continued in
the further order of the court.

8th day of August, 1898, the Telegraph Co. pre-
e Federal Court another petition, and asked leave
ame. The court continued this application until
1898, and required the Railway Co., by the date
to plead.

rences to proceedings, where not otherwise stated, are to the printed record.)

t 31, 1898, the Railway Co. filed its written motion
said petitions of the Telegraph Co., and each of
ing sixteen grounds therefor. See pp. 96 to 102
The motion to dismiss was overruled as to petition
Superior Court of Guilford county by order, p. 29,
dated August 31, 1898. See Bill of Exceptions,
pinion, pp. 31–41.

nber 15, 1898, the Circuit Court made an order by
ered that S. L. Trogdon, Esq., clerk of that court
ro, North Carolina, do appoint three disinterested
ent freeholders, resident in that district, and sum-
before him: that said persons so elected shall act
oners to assess the damages which the Southern

Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal Telegraph Cable Company, as proposed in the petition of said company: that said commissioners shall take before said clerk the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said Code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises: that said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside: that they take such testimony in respect to said damages to said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Co., or the value thereof, to it: that the first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause: and that after hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, and sign and seal the same and file it with the clerk of said court at Greensboro. See pp. 42–43.

This order was made upon application of counsel for the Telegraph Co., without notice to or knowledge of counsel for the Railway Co. Immediately upon hearing of the order, counsel for the Railway Co. brought the matter to the attention of the court, and an order was made on September 23, 1898, suspending the order of September 15, 1898, and required the Telegraph Co. to show cause on October 7, 1898, why the Railway Co. should not be permitted to file its answer and have the order of September 15, 1898, vacated and annulled. See p. 47.

On October 7, 1898, the parties plaintiff and defendant, by their attorneys, appeared before the court, and the Railway Co. tendered and asked leave to file its answer. The court, over the written objection of the Telegraph Co. (pp. 64-66), announced its purpose to allow the Railway Co. to file said answer, which

will be found at pp. 48 to 64, and the Telegraph Co. demurred *orally* to said answer, but the order filing said answer and noting said demurrer was not made until October 24, 1898. See pp. 69–70.

The paper headed "Demurrer to Defendant's Answer," pp. 64–66, was itself the answer tendered by the Telegraph Co. pursuant to the order of September 23, 1898, requiring the Telegraph Co. to show cause. It was not the demurrer. The heading is erroneous. The oral demurrer to the answer of the Railway Co. was argued October 7, 1898, and the court took time to consider. On October 17, 1898, the court filed a written opinion sustaining this demurrer. See pp. 66–69.

On October 24, 1898, the court made an order filing the answer of the Railway Co., noting the demurrer of the Telegraph Co., and sustaining said demurrer. The Railway Co. then asked leave to introduce testimony sustaining the averments of its answer, but the court in said order overruled this motion and refused to permit the Railway Co. to introduce testimony. The court also reinstated its order of September 15, 1898. To all of which ruling the Railway Co. excepted. See order, pp. 69–70.

On October 24th, 1898, the court made also another order, stating in detail certain exceptions taken by the Railway Co. to certain of its rulings, which will be found at pp. 75–76. The same exceptions, together with others set out with greater particularity, will be found in the three bills of exceptions of the Railway Co., to be found respectively at p. 30, p. 45, and p. 73.

On October 24th, 1898, the Railway Co. asked for a writ of error and supersedeas to the order of October 24th, 1898, sustaining said demurrer, refusing to allow the introduction of testimony, reinstating its order of September 15th, 1898, and otherwise ordering as therein set forth. The application for a writ of error and supersedeas, on the motion of the Telegraph Co., was continued until November 4th, 1898. See order, pp. 88–89, erroneously headed "Order refusing Appeal." On November 4th, 1898, a petition for an appeal, together with an

assignment of errors, was presented to the court, and will be found on pp. 78 to 86 inclusive. On November 9th, 1898, the court filed an opinion and made two orders, one of which recites the facts last above stated, and the other refused the Railway Co. the writ of error prayed by it. See pp. 87, 88–90.

On November 29, 1898, the Circuit Court set aside the last mentioned order and allowed the writ of error and supersedeas as prayed in the assignment of errors theretofore filed. See pp. 95–96.

IN THE CIRCUIT COURT OF APPEALS.

On the 30th of March, 1899, the Circuit Court of Appeals filed an opinion holding that no appealable order had been made by the Circuit Court and, on March 31st, 1899, made an order dismissing the writ of error for want of jurisdiction.

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond, in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error from the Circuit Court to the Circuit Court of Appeals to operate as a supersedeas—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a supersedeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein. The three last mentioned papers were duly filed in the Clerk's office of the Circuit Court of Appeals at Richmond, Virginia, on May 6th, 1899, together with copies of said writ of error and citation. A copy

of Judge Goff's said order of May 4th, 1899, and the original form of writ of error and citation signed by him are filed in the Clerk's office of this court.

IN THE SUPREME COURT OF THE UNITED STATES.

The record from the Circuit Court of Appeals reached the Clerk's office of this court Saturday, May 20th, 1899, and has not yet been printed, but the necessary fees were paid May 22, 1899, and the cause then docketed as No. 832, October Term, 1898. It now stands as No. 303, October Term, 1899.

On May 19, 1899, counsel for the Postal Telegraph-Cable Company caused to be served upon counsel for the Southern Railway Company the following notice (caption being here omitted), viz:

Motion by the Defendant in Error to Dismiss.

Now comes the defendant in error, The Postal Telegraph Cable-Company, by J. R. McIntosh, Counsel, and moves the court to dismiss the writ of error in this cause, (1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then, that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the writ, it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon, pending said writ of error.

(Signed) J. R. McINTOSH,
Counsel for Motion.

On May 22, 1899, counsel for the appellant appeared and filed a printed brief respectfully submitting that the notice of said motion was illegal and unsufficient, and on the same day the appellee appeared by counsel before this Court, and—while submitting the above notice—withdrew its motion to dismiss the writ of error allowed appellant; but moved the court to vacate the supersedeas.

This honorable Court adjourned without action upon appellee's motion.

ARGUMENT.

Under the rulings of this court in *Bohannan* v. *Nebraska*, 118 U. S., 231, and other like cases, that "the court will not consider the merits of the question involved in a case on a motion to dismiss unaccompanied by a motion to affirm,"—we cannot in resisting appellee's motion to vacate the supersedeas awarded in this cause, discuss the merits of the controversy, *i. e.*, the fundamental proposition of appellant that there is no law in existence under which a telegraph company may, in North Carolina, condemn a right of way for its purposes upon the strip of land constituting the roadway of a railroad: the contention of appellant that, by legislation subsequent to the adoption of the Code of North Corolina of 1883, the legislature of that State has repealed (as to telegraph condemnations) the statute under which appellee founds its application to condemn the property of appellant. These with many other vital questions going to the merits of the controversy, presented in the assignment of errors, must await a hearing upon the merits. Appellee's counsel will endeavor to avoid violation of the rule announced in *Bohannan* v. *Nebraska*, 118 U. S., 231; but, in resisting appellee's motion to vacate the above supersedeas, it will be necessary to analyze the orders of the Circuit Court rendered September 15, 1898, and October 24, 1898, and show what they determine upon their face, in order to demonstrate appellant's contention that the order of October 24, 1898, was a final order and that a supersedeas properly followed a writ of error thereto. The orders of September 15, 1898, and October 24, 1898, are as follows:

Order of September 15, 1898.

"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of

telegraph poles and the stretching of the wires thereon of Postal Telegraph-Cable Company, as proposed in the peti- of said Company to this court. That the said commis- ers shall take before the said clerk the oath prescribed in ion 1946 of the Code of North Carolina, and shall proceed ll respects as required in said Code in assessing such dam- s, estimating and assessing such compensation as may be for said Southern Railway Company by reason of the mises. The said commissioners shall hold their meetings he court-house of the United States, in the city of Greens- o, over which meetings said clerk shall preside, and they authorized and empowered to take such testimony in re- ct to the said damages to the said Southern Railway Com- y as they may deem pertinent, not, however, extending ir inquiry as to the benefit to be derived by the Telegraph , or the value thereof, to it. The first meeting of the com- ssioners, of which the said clerk shall give due notice to m and to the parties, shall be held ten days after notice of ir appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, l sign and seal the same and file it with the said clerk of this rt at Greensboro." See pp. 42–43.

Order of October 24, 1898.

This day came the defendant Railway Company and by ve of court filed its answer to the complainant's written notice l motion, to which said answer the plaintiff Telegraph mpany demurred, and after argument of counsel, and the tter being duly considered by the Court, said demurrer is reby sustained, and the defendant having asked leave to in- duce testimony sustaining the averments of its answer, which ve was refused by the court.

It is therefore ordered, that the former order made by this rt directing the clerk of this court, at Greensboro, North rolina, to appoint commissioners to assess the damages in e above entitled cause, is hereby reinstated; and the clerk of

this court is directed to fix a day not earlier than ten days after the entry of this order, for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts." See pp. 69–70, also pp. 73–76.

What this Order of October 24, Settled.

1. It sustained the demurrer of the Telegraph Co. to the answer of the Railway Co.

2. Refused permission to the Railway Co. to introduce testimony sustaining the averments of its answer.

3. Reinstated the order of September 15, 1898, directing its clerk at Greensboro to appoint commissioners to assess damages.

4. Directed Clerk Trogdon to appoint a day for the meeting of said commissioners.

Detailed Analysis of the Order of October 24.

It is respectfully submitted that this order of October 24, 1898, was a final order. By it the court—

1. Determines that North Carolina statutes are in force, under which the property of the Telegraph Co. can be condemned.

2. Proceeds in direct violation of these statutes, as construed by its own opinion in this cause.

3. Determines without proof the conditions precedent to condemnation under these statutes.

4. Refuses to hear proofs as required by section 1945 of the Code of North Carolina.

5. Determines, upon demurrer, that every defense set up in the answer of the Railway Co. is without merit, even though it were proved by conclusive evidence.

6. Determines that the Telegraph Co. may take possession and use the property of the Railway Co., without any further order of the court.

7. Determines that the entire condemnation may be made in one proceeding.

8. Prohibits testimony showing the value to the Telegraph

any for its purposes of the property sought to be con-
ed.

Delegates to its clerk the power of selecting and appoint-
isinterested freeholders to act as commissioners, and
rize him to preside over them.

Delegates to its clerk powers vested in the court and
ourt only.

n conceding that statutes are in force in North Carolina
, authorizing the condemnation of a railroad for the
uction of telegraph lines (which is earnestly denied) yet
n 2007 of the Code of that state requires that "such lines
egraph shall be so constructed and maintained as not to
ct or hinder the usual travel on such railroad."

Code of North Carolina Secs. 2007 & 2009.

. 2007. Telegraph lines, who may maintain. 1874–'5,
, s. 2.

y telegraph company chartered or incorporated by this or
ther state shall have the right to construct, maintain and
te lines of telegraph along any railroad or other public
ay in the State of North Carolina, but such lines of tele-
shall be so constructed and maintained as not to obstruct
der the usual travel on such railroad or other highway.

. 2009. Entitled to right of way upon just compensation.
'5, c. 203, s. 4.

h telegraph company shall be entitled to the right of way
he lands, privileges and easements of other persons and
rations, and the right to erect poles and establish offices,
making just compensation therefor.

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tion 1945 of said Code is the only statute which has at
me provided for the appointment of commissioners, and
statute requires *conditions precedent* to such appointment:
vides that all persons, whose estates or interests are to be
ed, may answer and show cause against the condemnation:
uires the court to hear the proofs and allegations of the

parties, in any and every event *before* appointing commissioners.

The full text of Section 1945 is as follows:

Code of North Carolina, Section 1945.

"*Allegations made against petition; Freeholders appointed to appraise estate.* 1871–2, c. 138, s. 15.

1945. "On presenting such petition to the Superior Court, as aforesaid, with proof of service of a copy thereof, and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings, may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

In no event can a telegraphic right of way be condemned on a railroad unless it be shown that the proposed telegraph line will be so constructed "as not to obstruct or hinder the usual travel on such railroad," &c., s. 2007. The condemning corporation must file its petition. The railroad upon which the right of way is sought to be condemned then files its answer. The issue is thus made up. This section requires the court to hear the proofs, and if no sufficient cause be shown against the condemnation, to appoint commissioners. Observe, however, that the court itself must hear the proofs upon which issue is joined *before* the appointment of commissioners. The court itself must determine that the right to condemn *exists*. The court itself must determine that the proposed telegraph line will not obstruct ordinary travel nor hinder the usual travel on such railroad. In order to know whether or not the line will do this, the court must know the character and location of the line. These questions are, therefore, *jurisdictional*.

1945 of the Code of North Carolina was construed
rcuit Court in its opinion of September 9, 1898, record
). The court there recognized the right of defendants
r and to introduce proofs, and its duty to hear proofs
termining whether the petitioner had the right to con-
nd also recognized the fact that the court itself (where
ent cause is shown against the right) must select such
oners and fix the day for their first meeting. At pp.
e court said:

tract from Opinion of the Circuit Court.

en, therefore, the petition is presented to the court, answers of defendants have been heard, with the n each side, if the cause shown against the petition ficient, the court shall grant an order naming three sted freeholders to act as commissioners of ap- and shall fix the day for the first meeting of these sioners."

swer of the defendant raised issues squarely. It (amongst enses) denied, in varied form, that the right of way of the was 100 feet wide; it declared in substance that this right as in many places very much less than 100 feet broad; as too narrow to make it physically possible to con- telegraph line thereupon in such manner as not to in- with ordinary travel. It declared, in effect, that the posed to be constructed by the Telegraph Company rossly imperil the running of trains and grossly ob- e ordinary use of the railroad. See record, p. 60, par- 1.

Extract from Answer of Railroad Co.

Further answering, defendant denies 'that the right of this defendant is 'about 100 feet wide, and it about 50 feet from a line along the centre between s of said main track;' on the contrary, defendant hat the strip of land along which its tracks are laid trains are run varies greatly in width at different

ints along its line, and that at sundry points along said
e included in and covered by the condemnation proceed-
gs of the plaintiff is much less than 100 feet in width, in-
ed, is so narrow that to erect a telegraph line thereupon
the manner set out in said petition would be impracti-
ble, or, at least, would grossly imperil the safe operation
defendant's railroad, and grossly obstruct or hinder the
ual travel thereupon."

The plaintiff Telegraph Company *demurred* to this answer
l the court *sustained the demurrer.* When the court sustained
e demurrer, it declared in substance that the answer was
thout merit; that even though the Railway Company might
ve all the averments of the answer, by legal and conclusive
dence, yet the plaintiff would be entitled to the relief prayed;
t the plaintiff had the right to condemn a right of way upon
e land of the defendant.

In a word, the court determined that the Telegraph Co.
s and had the lawful right to construct its lines upon ap-
llant's railroad, notwithstanding the distinct and definite
mission of the Telegraph Co., by its demurrer to defend-
t's answer, that, as a matter of fact, the strip of land con-
tuting the roadway of the Railroad Co.—"is so narrow
t to erect a telegraph line thereupon in the manner set
t in said petition would be impracticable, or, at least,
uld grossly imperil the safe operation of defendant's
lroad, and grossly obstruct or hinder the usual travel
reupon."

Of course, after sustaining the demurrer to appellant's
wer, the court acted logically in refusing to allow appellant
introduce testimony sustaining the averments of its an-
er." When the court, upon demurrer, determined that
re was no merit in any of the defenses set up in the answer,
robably considered it idle to allow the introduction of testi-
ny establishing facts which the Telegraph Company admitted
e true, and which the court considered insufficient to defeat
rights claimed by the Telegraph Company. But, in adopt-

v, the court closed and ended the case, upon every ques-
the petition and answer—save and except *the amount*
ion; and the Railroad Company was practically
om further defending itself, upon any other ground

The defendant, however, was advised, and is to-
, that the time had not arrived for battle upon this
ion of compensation, and would not legally arrive,
urt should first permit it to introduce proofs upon
t and *jurisdictional* questions raised in its answer,
pass upon these proofs adversely, holding that they
ain and establish these vital defenses.

aspect, legal and practical, the questions raised in
re vital questions to the appellant. Not only do
n and determine the existence or non-existence of
the Telegraph Company to condemn the property
oad, but upon their solution depends the railroad's
' possession and control of its own right of way,
to the efficient discharge of its great public duties
ions. Compared with these considerations, the
noney compensation to be awarded the defendant,
roperty shall be taken by the petitioner for its pur-
subordinate importance.

ppellant is further advised and submits, that the
North Carolina do not contemplate or provide for
sation whatever being awarded, under the condi-
th in its sworn answer; that these statutes do not
or intend that any sum of money, however great,
l paid in damages, can authorize the petitioning
Company to construct and maintain its lines upon
way of the defendant railroad, or properly com-
railroad therefor—if such construction will ob-
der the usual travel on such railroad, or imperil
ration, as it is clearly set forth in the defendant's
construction and maintenance will do.

tiff in error is yet further advised and submits that
he above *not the theory of said statutes*, but that said
e been *so construed* by the honorable Circuit Judge

trial court, by his said order of October 24, 1898, and id order is therefore erroneous and clearly final.

finality of an order is uudoubtedly to be determined legal effect. If then, an order refuses to hear proof jurisdictional conditions precedent set up in sworn an- and, in spite of the defendant's distinct plea, backed up plaintiff's substantial admission, that said plaintiff is titled to the property claimed by him—indeed, that such is clearly excluded by the express proviso of the very upon which alone such claim is and can be based—if , in the face of all this, such an order authorizes, not, , the court, but a third person, to appoint commission- assess the value of the defendant's property, refusing n opportunity to prove anything, save the amount of nsation to which he is entitled, and, upon payment of nount fixed by such commissioners, further authorizes itioning plaintiff to take and hold the property so val- would seem clear beyond dispute that such an order as *every element of finality.*

ortant side-light is thrown upon our position with re- the character and finality of the order of October 24, nd it is brought out in clear relief, by the opinion of preme Court of the United States in the case of *E. Tenn. Ga. R. R.* v. *So. Tel. Co.*, 112 U. S., 306, etc., which p upon error to the United States Circuit Court for the district of Alabama, and involved the construction of inent Domain Statute of that State. The court, upon 309–310, says:

is is a proceeding, under the statute of Alabama, to as- the amount of compensation to be paid the railroad ny for the appropriation of its property to the use of the ph company. That is the single question to be settled. emedy is statutory only, and every court which takes ction for its enforcement is limited in its powers by the under which it alone can act. It must be assumed, for purposes of the proceeding, that the telegraph company e right to make the appropriation, and that as soon as

ation is made, it may enter on the property and ork its lines."

ould not make more clear the distinction—nay -between cases of this character, in which it is * * that the telegraph company has the the appropriation," and "the single question to "the amount of compensation to be paid the any"—and the case at bar, in which the defend- ry threshold of the proceeding, raises questions nce *the existence of the right* and the *jurisdiction of*

THIS COURT JURISDICTION?

ion is denied upon the sole ground that the or- om is *not final or appealable.*

al basis of our application to this honorable found in the order entered October 24, 1898, ication also incidentally includes and is strength- rors embodied in the other and earlier orders. *nderstood, however, that the plaintiff in error is not an order appointing commissioners to fix compensa-* when the character of its above-mentioned an- ghly comprehended—to which answer the order h sustained the demurrer of the plaintiff, and of which it refused to allow the defendant to ofs—it will be seen that, not only were the mer- involved, but the entire basis of the proceed- dant's answer not only denying the existence horizing the condemnation of its property by also vouching for its protection and defense, viso of the statute upon which the plaintiff re- which it proposed to proceed, and offering to oof, the absence of the indispensable condition ne application and operation of said statute, as proviso.

aware that, in ordinary condemnation suits, an

appealable order is not reached, indeed, cannot be entered until *the amount of compensation* is awarded by the commissioners and confirmed by the court; and this, because there is really no other substantial question involved.

But, in the case at bar, not only did the defendant below deny the existence of any statute under which the condemnation of its property for the purposes of the plaintiff could be lawfully conducted and effectuated, but it also charged and offered to prove that its right of way was of such a character that the telegraph line of the plaintiff could not be "so constructed and maintained as not to obstruct or hinder the usual travel" on its railroad; nay offered to prove much more than this, to-wit: that "its right of way was so narrow that, to erect a telegraph line thereupon, in the manner set out in said petition, would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad"—that is, would grossly imperil the lives of the citizens of the State and of the country at large, travelling upon defendant's railroad trains; and all this might happen without the entry of any further order by the court, which had turned the matter over to its clerk to appoint the commissioners and superintend their sessions; the statute, section 1946 of the Code, authorizing the plaintiff company to take possession of the defendant's property and to construct, maintain and operate its line thereupon, upon "payment into court of the sum appraised by the commissioners," upon the filing of their report in the clerk's office.

Just here we submit three questions, to-wit:

(1) Is the issue thus raised and the defense thus interposed in the answer a substantial issue and a valid defense, or not?

(2) Had the defendant, at the time he filed his answer, or will it ever have, the right and opportunity to raise this question and to interpose this defense?

(3) If so, when and where?

Could the defendant, though well aware of the existence of

a state of facts which must eventually defeat and render nugatory the entire expensive and vexatious proceeding before commissioners, yet remain silent and allow the court to appoint them and allow them to make their appraisal and report, (for surely such a question cannot be raised before them; neither their oath nor their duties, as defined by the order of September 15, 1898, page 42, nor their capacities cover or include such a question nor fit them to pass upon it), *and afterwards* take the chances of inducing the court to go back and take up a question which manifestly, in the nature and logic of things, should have been raised and disposed of, *before* all these steps were taken and proceedings had, the defendant having been thoroughly aware from the first that they must come to naught? Nay, under such circumstances it is hardly reasonable to speak of "*the chances*" of the court's hearing the defendant, if he should attempt, *after the coming in of the report*, to raise this obviously antecedent and fundamental question. Upon the general principles which regulate judicial procedure, it is clear the court would not hear the defendant who had thus failed to speak at the proper time, unless this failure was in some proper way explained and condoned. Indeed, if the court will kindly glance at section 1946 of the Code of North Carolina of 1883, and then at the order of September 15, '98, it will at once perceive that the chart of the commissioners' duties and powers is such that, neither upon the basis of the Code nor of the order, could it be logically possible to raise before them this issue, as to the defeat of the right to condemn, by the proviso as to obstruction or hindrance to travel.

In short, our view is that a condemnation proceeding, of the character of that under investigation, substantially embraces two separate and successive proceedings—the first of which concerns only and must determine the existence of the right to condemn, and the second is limited to the subsequent inquiry as to the amount of compensation to be paid, for property adjudged in the first proceeding to be liable to condemnation. To the defendant railroad company, the essential question is, whether it may retain the exclusive

possession and control of its right of way, which it regards as indispensible to the safe and efficient discharge of its great public function and duty, or whether it shall be compelled to receive upon its right of way another company which will have independent and antagonistic rights thereon. Any order which determines that question is a final order in that proceeding; the final order, indeed, to the railroad; and the question of the amount of compensation is essentially another and distinct question and issue, triable before another tribunal, after the court has disposed of the prior and graver question, as to the existence of the right to condemn. To such an extent, indeed, did the trial court take this view of the matter, that it actually, and as we claim erroneously, turned over this secondary phase of the proceeding to its clerk, even authorizing him to select and appoint the commissioners.*

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* **In the second assignment of errors printed in full at record page 85,** the Railway Co. submitted (amongst other errors there assigned) that the Court "erred in directing its clerk to appoint commissioners to assess damages as therein set out, and erred in prescribing the oath to be taken by said commissioners and in directing the mode of procedure and the principles and rules by which said commissioners should be governed, and erred in fixing the place for the sessions of said commissioners and how they shall be presided over, and the elements to be considered by them and the form and substance of their report."

The order of September 15th, 1898, appointing commissioners (record, pp. 42–43) provided (amongst other things) as follows: viz:

(a.) **"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him.** * * *"

(b.) **"The said commissioners shall hold their meetings in the court-house of the United States, in the City of Greensboro, over which meetings said clerk shall preside.** * * *"

(c.) **"The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause.** * * *"

This order is in direct violation of Section 1945 of the Code of North Carolina, which provides (amongst other things) as follows:

"The court shall hear the proofs and allegations of the parties, and,

Let us now briefly examine the statutes and decisions of North Carolina regulating the matter of appeals, and then a few authorities from other States and jurisdictions recognizing in analogous cases this dual character of condemnation and certain other proceedings, with the bearing and effect of this feature upon the question as to *the finality or appealable character of decrees and orders.* We trust that, even such a hurried examination as we shall be able to make will serve to show that the principles and positions above enunciated are recognized by the courts, and have been approved even by the Supreme Court of the United States.

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f no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested nd competent freeholders, who reside in the county where the premses are to be appraised, for the purposes of the company, and shall fix he time and place for the first meeting of the commissioners."

The full text of this section will be found at p. 51 of the record.

It is respectfully submitted that the Circuit Court could not rightfully delegate its power to appoint commissioners to S L. Trogdon, Esq., its clerk.

The selection of commissioners was a matter of vital importance. The statute imperatively required them to be disinterested and competent freeholders. The questions of competency and disinterestedness were important subjects to be considered by the court in the appointment of such commissioners. It would take one of much boldness to contend that an incompetent freeholder should be appointed. It would take one of greater audacity to suggest that an interested freeholder could impartially discharge the duties of a commissioner. The determination, of the competency and disinterestedness of the freeholders to be appointed, was lodged by the statute, in the sound legal discretion of the court. It was a burden and duty placed upon the court. If a case arose requiring the appointment of commissioners, the court and the court only could make the appointment. If the court could abdicate its important functions in this matter and clothe its clerk with the power of appointment, it could delegate the power to any other officer of its court, to any member of its bar, to an individual at large.

The order of September 15, 1898, directed that **"the said commissioners shall hold their meetings in the court-house of the United States in the city of Greensboro."**

It is provided in the early part of Section 1946 of the Code of North Carolina in respect to said commissioner, that: **"They shall view the premises described in the petition."** See p. 52.

The requirement of said order that **"said commissioners shall hold**

WHEN APPEALS MAY BE TAKEN.

Extracts from the Code of North Carolina, Regulating Appeal.

"*Sec. 562. Intermediate orders affecting the judgment may be reviewed on appeal. C. C. P., s. 313.*

"Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment."

"*Sec. 945. Supreme Court, its jurisdiction. Const., Art. IV, s. 8, C. C. P., s. 413.*

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference * *."

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their meetings in the court-house of the United States in the city of Greensboro," was in disregard of said provision of the statute. It was greatly prejudicial to the rights of the Railway Co The case at bar was one in which it was peculiarly necessary that the commissioners should view the premises. The strongest conceivable reasons exist for a view of the premises where a telegraph company seeks by hostile means and the strong arm of the law to condemn a right of way for its purposes along the narrow strip of land constituting the road-bed of a railway company. This proposition, capable of endless elaboration, seems too plain to require discussion.

The order of September 15th, 1898, goes further in respect to said meetings. It provides that "the said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, **over which meetings said clerk shall preside."**

The words "said clerk" refer to S. L. Trogdon, Esq., by whom said commissioners were to be appointed.

Where is the authority for the appointment of this presiding officer? The court migh as well have appointed a stranger as its clerk. If it had the power to appoint the one, it had the power to appoint the other. The mandate of the statute is, in a proper case, that **"the court shall appoint three disinterested and competent freeholders."** Where is the authority for the enlargement of this body? Where is the authority for adding, not simply a fourth commissioner, but one clothed with the power of a presiding officer? What were to be the powers and duties of this presiding officer? Was he to guide and direct their deliberations? Was he to charge

"*Sec. 962. On appeal from interlocutory judgement, &c., no judgment to be entered; opinion with instructions to be certified to court below. R. C. c. 33, s. 14, 1831, c. 20, s. 3.*

"When an appeal shall be taken to the Supreme Court from any interlocutory judgment, the Supreme Court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions * *."

"*Sec. 548. Appeal, in what cases it may be taken. C. C. P., s. 299.*

"An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of

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them as the court charges a jury? Were his powers advisory or mandatory? Were the commissioners to defer to his views, or might they follow their own, where a difference of opinion existed? Did he have a vote in fixing the amount of compensation?

The order of September 15th, 1898, record, pp. 42-43, provides that "the first meeting of the commissioners * * * shall be held ten days after notice of their appointment has been served on the parties to this cause." Under this order the clerk fixed the time for the first meeting of the said commissioners. By issuing notice at an early or late day, the clerk could have the commissioners to meet at such time as he, in the exercise of his discretion, wisely or unwisely, might determine, while the statute contemplated that the court, in the exercise of a sound legal discretion, should fix the time for the first meeting of the commissioners. The language of the statute conferred this power upon the court. The order, in violation of the statute, delegated this power to a third person.

The powers conferred upon S. L. Trogdon, Esq. (Clerk), were never contemplated by the Act of Congress clothing Circuit Courts of the United States with jurisdiction, and providing for the removal of causes from a State to a Federal tribunal. The Constitution of the United States and the statutes made in pursuance thereof contemplated that judicial power and authority should be exercised by the courts of the United States, and not by a private individual even though such private individual might occupy the ministerial position of clerk of the Federal court. When this cause was removed from the State court to the Federal court, the Railway Co. had a right to expect that all judicial power should be exercised by the Court and that all orders affecting its rights should be made by this tribunal.

term, which affects a substantial right claimed in any action or proceeding; or which, in effect, determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

Decisions of the Supreme Court of North Carolina construing and applying the provisions of the Code of that State regulating appeals.

92 N. C., 657.

Subject: When Appeal May be Taken.

In *Merrill* v. *Merrill*, 92 N. C., 657, the first two paragraphs of the syllabus are as follows:

"1. An appeal can be taken from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant; and *it seems* that the appeal may either be taken at once, or it can be assigned as error on an appeal from the final judgment."

"2. An appeal lies at once from an interlocutory order that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining."

Merrimon, J., in delivering the opinion of the court (page 659), said:

"It is well settled in respect to the time when it may be taken, that an appeal always lies at once from an interlocutory order or judgment that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining, if the appeal should be delayed until after the final judgment upon the merits."

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78 N. C., 181.

Subject: When Appeal May be Taken.

In *Commissioners of Wake County* v. *Magnin*, 78 N. C., 181, Reade, J., in delivering the unanimous opinion of the court (pp. 184–5) said:

"It is objected by the plaintiffs that the order below, over-

the demurrer, was not appealable; because it was not a udgment nor did it affect *substantial rights*. C. C. P., s.

'e have, however, over and over again, entertained ap- from such orders; and although it may admit of doubt er the Code would not bear a different construction, yet matter of practice which experience can best test, and if to be inconvenient, it can be easily altered by legislation, sibly by a rule of this court. But it ought not to be left to wreck legal navigation, and therefore we decide that der was appealable. In this case it works well, because an end to the action and saves the expense and trouble ial which could have availed nothing. But in a kindred etween the same parties at this term, where the demur- overruled, it had not the same advantage; for the case go down for an answer and trial. Yet even in that case cision of this court upon the demurrer may be, and we se will be, decisive of the case upon its merits.

here is error. Judgment reversed and judgment here fendants."

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91 N. C., 418.

Subject: When Appeal May be Taken.

rsey v. *Railroad*, 91 N. C., 418.

il action for damages tried at Fall Term, 1883, of Gaston ior Court.

e defendants demurred to the complaint on the ground t did not state facts sufficient to constitute a cause of .

the hearing the demurrer was overruled and, judgment rendered for the plaintiff, the defendant appealed.

ith, C. J., in delivering the unanimous opinion of the (p. 419), said:

he right of the defendants at once to appeal from a judg- overruling a demurrer to the complaint is expressly de- l in the case of *Commissioners of Wake* v. *Maguin*, 78 N.

C., 181, and has been repeatedly recognized and acted on since."

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95 N. C., 248.

Subject: When Appeal may be taken.

In the case of *Clements* v. *Rogers*, 95 N. C., 248, the first paragraph of the syllabus is as follows:

"I. Where an action is brought for an account, and the answer pleads matter in bar of the account, and a trial is had of the issues raised by the plea in bar, an appeal lies by the defendant from a judgment ordering an account before the account is taken."

Decisions of the Supreme Court of Appeals of West Virginia, holding that the right to condemn should be determined before the appointment of commissioners, and that the order determining such right is an appealable one.

6 W. Va., 397.

Subject: Order determining right to condemn immediately appealable.

In the case of *Ches. & Ohio R. R. Co.* v. *Pack*, 6 W. Va., 397, the court at pp. 408–411, said:

"Under the provisions of Chapter 42, when a company, incorporated for the construction of an internal improvement, makes application to a Circuit Court to appoint commissioners to ascertain a just compensation to the owner of land proposed to be taken, the applicant must prove or the owner admit, or it must in some way appear to the court, that the applicant has a lawful right to take the land for the purpose stated in the application, and the court must decide that fact, before the appointment of freeholders. The right to take the land implies the consent of the owner: unless the land be in a city or incorporated town, when consent is not necessary. Consequently the consent, when requisite, must be approved, or admitted or given in court, before or at the time when the court adjudicates the right to take the land and proceeds to appoint commissioners."

After the court has acted, when it appears by the record
a proper application in writing was made to the court, and
ice given to the owner of the land, or he appeared, and it is
nd recited that the court was of opinion that the applicant
lawful right to take the land, and the court appointed free-
lers, and, with the action of the parties themselves, organ-
l the commissioners, this implies either the consent of the
ner, or the location of the land in a city or incorporated
n—one or the other of which facts is indispensable, though
ner is sufficient, to authorize the judgment as to that primary
. Though after the commissioners have been appointed,
t should appear on the record or be within the recollection
the Court, that there was no proof or admissions of either
these facts, or any others necessary to the judgment given
l consequent action taken; or if the owner should show to
court that notwithstanding his employment of reasonable
gence, he was, by fraud, accident or mistake, prevented
m defending or excepting to the proceeding, and that the
ual facts were not adduced, or that those presented to the
rt might have been overthrown or avoided, or did not war-
t the judgment; the court before which the case was pend-
should set aside the judgment and action; and, if, under
such circumstances, the court failed to do so, and the facts,
uld by bill of exceptions, or otherwise, appear in the record,
s court would reverse the judgment. But, when no such
ng appears, this court must presume that the judgment of
Circuit Court was proper and accordingly must affirm it."

"Many authorities, upon subjects more or less analagous,
ongly indicate that even though the owner may not have
ressly consented that an improvement company applying
it, should take his dwelling house and adjoining land, yet
company's filing the application, their notice to, or the ap-
rance of the owner, and his failure to object—especially
en he participates in the designation of commissioners to
praise the land—in themselves constitute or conclusively im-
consent."

"If the court, with the co-operation of the parties, should

t commissioners, whose duty it would be to bring wit- before them, hear them testify, read depositions, and go and view the land, hear counsel, and ascertain a just nsation to the owner for the land to be taken, and dam- other land, beyond the peculiar benefits to be derived the contemplated improvement, and make their report; ore the court should finally determine the right to take nd for any compensation whatever; this would occasion t unreasonable and onerous expenditure of labor and , without assurance of benefit to either party. With practice, the owner would take his chance for high es, and afterwards, if he were disappointed, would deny nsent, or controvert the right to take the land, and so the purpose of the proceeding. Failing to object and uently supposed to consent, he would thus abuse the ity of the applicant, evade the vigilance of the court, aving availed himself of the attendance and examination nesses, and the action of commissioners, would after- as the result might be favorable or unsatisfactory, adopt ect the appraisement."

he commissioners are charged with no inquiry as to the t of the owner, and nothing as to that fact can properly sented to or considered by them. Indeed, so far as the e expresses its purpose, the court itself, having appointed ommissioners, has afterwards no power in any case to sider the propriety of what it did. Though, I suppose, the peculiar circumstances heretofore suggested, the may review and reverse its former action and again act e subject."

xcept under such circumstances, when the report has returned, if no good cause relative to the action of the issioners be shown against the report, and it be not erro- or defective on its face, the court should confirm it.

* * * * * * * "

nder the law, the court enters no other judgment than, o determine the legal right to take the land, and, after mmissioners have acted, to confirm their report. From

gments, without other sentence or condemnation, the right of the applicant, within twelve months late of the report, to pay the sum ascertained, with nd thereupon to become invested with the title to the

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31 W. Va., 710.

Order determining right to condemn immediately appealable.

case of *Railroad Co.* v. *Iron Works*, 31 W. Va., 710, oad Company sought to condemn certain property to the Iron Works. The latter answered denying roperty could be lawfully condemned in that pro- out the trial court, upon consideration of the plead- evidence, determined that the Railroad Company had to condemn the property of the Iron Works, and determined, appointed commissioners to appraise the he property. At this stage of the proceedings the ks obtained a writ of error and supersedeas, and the heard by the Supreme Court of West Virginia and The unanimous opinion of the court was delivered n, President, who (with regard to the action of the), at pp. 717–718, said:

.* the court found for the petitioner on the issues nd thereupon it was considered by the (trial) court er notice had been given, and that the said petitioner l right in this proceeding to take for the purposes the amended petition, the several parcels of land in mended petition mentioned and described, and for poses to acquire title to said parcels upon just com- ; to which ruling and judgment of the court the , Benwood Iron Works, excepted, and tendered its ceptions thereto, and asked that the same might be d sealed by the court and made a part of the record hich was accordingly done. The court then proceeded t the commissioners. To this order the Benwood ks obtained a writ of error and *supersedeas*."

main question to be decided is: Was the use to which

ds sought to be condemned were to be put, a public use? then, of course, the lands could not be legally con- d under the law of eminent domain. If the use were then it matters not that the Benwood Iron Works had nty years reserved its lot for the purpose of building a urnace thereon. It could be taken for public use, and s to the Co. could be compensated in damages. The n here is not one of compensation, but it is whether itioner had the right to take the property. It, of course, right to take private property for private use, but it has ht to take private property for public use, on paying a mpensation therefor. The right to take, which depends whether it is to be taken for public or private use, is a l question, and the decision of the Circuit Court on that n is subject to review. *Railroad Co.* v. *Railroad Co.*, 17 ., 812."

34 W. Va., 155.

ct: Order determining right to condemn immediately appealable.

he case of *Bridge Co.* v. *Bridge Co.*, 34 W. Va., 155, the ing Bridge Company petitioned the Circuit Court of ounty, West Virginia, to condemn certain land belong- the Wheeling & Belmont Bridge Company. The de- t company filed seven pleas, of which three were rejected sue was joined on the remaining four. A jury was im- d, and found in favor of the plaintiff Thereupon, an was made determining that the property of the defendant ny was subject to condemnation, and commissioners ted to assess damages. At this stage of the proceedings eal was taken to the Supreme Court of Appeals of West ia and the judgment of the trial court was affirmed.

delivering the unanimous opinion of the court, Lucas, , at p. 162, said:

jury was impanelled, and upon the defendant's four upon which issue was joined, they found separately for

, and then rendered a general verdict as follows:
ıry, find for the petitioner, the Wheeling Bridge
ın each and all of the issues joined.' Thereupon
as rendered, that there was necessity to condemn
demanded, and a commission was appointed to
t compensation to the owners. Proceedings were
however, until a writ of error could be prosecuted
t."

order of the Supreme Court of Appeals of West
firming the judgment of the trial court, the case
to the Supreme Court of the United States, and
der the title of *Belmont Bridge* v. *Wheeling Bridge*,
87.

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35 W. Va., 205.

der determining right to condemn immediately appealable.

ling Bridge & Terminal R'y Co. v. *Camden Consoli-*
., 35 W. Va., 205 an appeal was taken from the
f the trial court that certain property was subject
ation and appointing commissioners, and the judg-
ffirmed by the appellate tribunal.
to appeal from the judgment of the trial court,
that the property was subject to condemnation,
ing commissioners to assess damages, was consid-
ll settled, that the point was not noticed or dis-

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of the Supreme Court of the United States re-
he proceedings in a West Virginia condemnation
he appointment of commissioners as "a distinct
," and also following the State Court as to the
character of the prior order determining the
ndemn.

138 U. S., 287.

Subject: When order final or appealable.

In *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S., 287, Mr. Justice Field, in delivering the unanimous opinion of the court, at p. 290, said:

"The defendant in error, the plaintiff below, moves in the alternative to dismiss the appeal on the ground that the judgment recovered is not final, or to affirm the judgment on the ground of the manifest insufficiency of the errors assigned. The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. A right to condemn, as held by the Supreme Court of the State, is to be determined before the appointment of commissioners to estimate the amount of compensation to be made. *Baltimore & Ohio Railroad* v. *Pittsburgh, Wheeling, &c., Railroad*, 17 W. Va., 812. **If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners, to be appointed, and might therefore be treated as being a distinct proceeding.** The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction. The motion to dismiss must therefore be denied. * * *"

We quote from other decisions of the Supreme Court of the United States, not as furnishing a strict analogy to the case at bar, but rather for the purpose of showing that

The oft quoted rule that an order or decree—which leaves anything further, of a judicial nature, to be done in the

cause, is not final or appealable is not to be regarded as a rule of universal application.

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3 Cranch, 179.

Subject: When order final or appealable.

In *Ray* v. *Law*, 3 Cranch, 179, the court said:

"The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree.

* * * * * * * *

"The court, however, is of opinion that a decree for a sale under a mortgage is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies."

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13 Peters, 13.

Subject: When order final or appealable.

In *Whiting and others* v. *The Bank of the United States*, 13 Peters, 4, the court at page 13 said:

"But is the objection itself in principle well founded? That depends upon this: whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a court of equity, and the proceedings on that decree a mere mode of enforcing the rights of the creditor, and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final upon those merits as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For, if the sale had been completed under the decree, the title of the purchaser under the de-

cree would not have been overthrown, or invalidated even by a reversal of a decree; and consequently the title of the defendants to the lands would have been extinguished; and their redress upon the reversal would have been of a different sort from that of the restitution of the land sold. In *Ray* v. *Law*, 3 Cranch R., 179, it was held by this court that a decree of sale of mortgaged premises was a final decree in the sense of the Act of Congress, upon which an appeal would lie to the Supreme Court. This decision must have been made upon the general ground that a decree, final upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law. * * * * "

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6 Howard, 201.

Subject: When order final or appealable.

In *Forgay* v. *Conrad*, 6 How., 201, this court at page 203 said:

"The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

And at page 204 the court said:

"* * * * And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal

to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

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2 Black, 530.

Subject: When order final or appealable.

In *Bronson* v. *Railroad Company*, 2 Black, 524, the court, at pp. 530–531, said:

"If this court should find that Bronson & Soutter are entitled to their whole claim, and in the meantime the property is sold and out of their control, how would their success benefit them? It would be a victory barren of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for the purchasers at a judicial sale are protected.

"A rule, from which consequences so injurious to the rights of parties litigant would necessarily result, has never received the sanction of this court.

"This decree is not final, in the strict technical sense of the word, for something yet remains for the court below to do. But, as was said by Chief Justice Taney, in *Forgay et al* v. *Conrad* (6 How., 203), 'this court has not therefore understood the words 'final decrees,' in this strict, technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

"In the case of *Ray* v. *Law* (3 Cranch, 179), and *Whiting* v. *The Bank of the United States* (13 Wheaton, 15), this court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled, and the subsequent proceedings were simply a means of executing the decree."

7 Wall., 342.

Subject: When order final or appealable.

In *Thomson* v. *Dean*, 7 Wall., 342, a motion was made to dismiss the appeal on the ground that the decree from which it was taken was not final.

The Court refused to dismiss the appeal, and its ruling is stated in the syllabus, as follows:

"1. The rule laid down in *Forgay* v *Conrad*, (6 Howard 204), as to what constitutes a final decree for the purpose of an appeal, recognized as the true rule on the subject.

"2. Hence, where a bill related to the ownership and transfer of certain stock, a decree was held to be final when it decided the right to the property in contest, directed it to be delivered by the defendant to the complainant by transfer, and entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership."

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105 U. S., 527.

Subject: When order final or appealable.

In *Trustees* v. *Greenhow*, 105 U. S., 527, Mr. Justice Bradley in delivering the opinion of the court at page 531 said:

"The first question, however, is, whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are, certainly, a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. **Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.** The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

129 U. S., 206.

Subject: When order final or appealable.

In Farmers' Loan and Trust Company, 129 U. S., 206, this court awarded a mandamus directing the Judges of the Circuit Court to allow an appeal. The syllabus of the case is as follows:

"An order of a Circuit Court of the United States, in a suit in equity for the foreclosure of a mortgage upon the property of a railroad company, that the receiver of the mortgaged property may borrow money and issue certificates therefor to be a first lien upon it, made after final decree of foreclosure, and after appeal therefrom to this court, and after the filing of a supersedeas bond, establishes, if unreversed the right of the holders of the certificates to priority of payment over the mortgaged bondholders, and is a final decree from which an appeal may be taken to this court."

The first and fourth paragraphs of the opinion, pp. 213–215, are as follows:

"The reasons why the judges declined to allow this appeal may be substantially divided into two. The first and most important of these is, that the order from which the appeal is asked is not a final decree, within the meaning of the act of Congress on that subject, but is a mere ancillary proceeding for the protection of the property pending an appeal from the principal decree now before this court. But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court. *Blossom* v. *Milwaukee, &c., Railroad Co.*, 1 Wall, 655; *Forgay* v. *Conrad*, 6 How., 201; *Fosdick* v. *Schall*, 99 U. S., 255; *Williams* v. *Morgan*, 111 U. S., 684; *Burnham* v. *Bowen*, 111 U. S., 776."

* * * * * * * *

"These views we do not propose to elaborate, further than to say that if this order does not give the lender of the money

h prior lien upon the proceeds of the property of the com-
ıy, it is because the court had no authority to make it, and
t would be a fraud upon such lender justice could only be
ıe by enforcing it. If this view of the subject be correct,
which we entertain no doubt, the order is a final one. It is
ecree fixing upon the property, on which the trust company
v has a first lien, another lien of $120,000, and making it
amount to that. **It changes the relation of that company**
this property, displaces its rights as settled by a decree
w pending in this court, and if that decree is affirmed, it
effect modifies it, although this court may say that it
ould stand and be enforced. This order comes within all
e elements of finality which we can imagine to belong to
decree of the Circuit Court. It establishes certain rights
the parties, to the injury, as petitioners believe, of their
erests in the property.''

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140 U. S., 52.

Subject: When order final or apppealable.

In the case of *Hill* v. *Railroad Company*, 140 U. S., 52., Mr.
stice Field, speaking for the court, at pp. 53–54, said:

"The case is now before the court upon this last appeal, and
e question is whether, upon it, any of the matters which were
termined by the decree of June 8, 1885, are again open for
nsideration. All the errors alleged relate to that decree.
ne are assigned to the decree of July 14, 1887.

"We are of the opinion that the decree of June 8, 1885, was
inal decree, within the meaning of that term in the law re-
ecting the appellate jurisdiction of this court, as to all mat-
rs determined by it, and that they are closed against any
rther consideration. It disposed of every matter of conten-
on between the parties, except as to the amount of one item,
d referred the case to a master to ascertain that. It dismissed
e bill against several defendants for want of equity, and de-
ed relief to the complainant upon all matters in controversy
cept as to that amount, and retained the case only as against

rties interested in that matter. The rights and liabilities
he parties were in other respects determined.
nt there was no adjudication as to the payment of the
nt to be ascertained by the master; that remained unset-
It was, however, *a severable matter from the other subjects*
roversy and did not affect their determination. The fact that
not disposed of did not change the finality of the decree
he defendants against whom the bill was dismissed; that
nt, or to whom made payable, did not concern them.
were no longer parties to the suit for any purpose The
from the subsequent decree did not reinstate them. All
erits of the controversy pending between them and the
ainant were disposed of, and could not again be reopened,
on appeal from that decree. As to the other parties,
nained to ascertain the amount of one item and to
nine as to its payment. The decree of July 14, 1887,
d that matter, and finally disposed of it. *The decree of*
8, 1885, was appealable as to the matters which it fully de-
d; so also was the decree of July 14, 1887, as to the sever-
atters which it involved. Todd v. *Daniel*, 16 Pet., 521;
y v. *Conrad*, 6 How., 201; *Withenbury* v. *United States*, 5
819; *Germain* v. *Mason*, 12 Wall., 259; *Milner* v. *Meeks*,
S., 252. But the time to appeal from the first decree
d; and, no question being raised as to the second decree,
f July 14, 1887, it must be *Affirmed, and it is so ordered.*"
s ours.)

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have thus adduced and quoted decisions from the
of last resort, in the State in which this proceeding
originally brought,—decisions from the highest court
other State, carefully construing a statute *in pari materia*
that here under construction, and where the question
and passed upon was strictly analagous to that we
raised and which is now before this court for decision,
lastly, decisions to the like effect from the Supreme
of the United States. If we understand them, the
of all these authorities is that—courts of last resort
ot "stick in the bark," but endeavor to decide cases

according to their essential logic and the very right of the cause; so that, where, as in the case at bar, a distinct and severable question, indeed ***the great question in the cause***, has been passed upon by the court; and by it, vital rights of one of the litigants have been so far settled that, without further order of the court, the possession of his property will pass to the opposite party, who may at once enter and build thereupon his own structures—such an order as this, we say—an order thus embodying every essential element of finality—will be held by this honorable court to be ***an appealable order.***

The Circuit Court of Appeals, in its opinion in the case at bar, refers to the following decisions of the Supreme Court of North Carolina, viz: Telegraph Co. v. W. C. & A. R. R. Co., 83 N. C., 420; Commissioners v. Cook County, 86 N. C., 18; Railroad v. Warren, 92 N. C., 620; Hendricks v. Railroad, 98 N. C., 431.

By reference to these cases it will be seen that they are widely different from the case at bar.

In No. 1. *Telegraph Co.* v. *W. C. & A. R. R. Co.*, 83 N. C., 420, the court, at page 423, said:

"*As the right to take possession is given only after final judgment of confirmation* and then is not interrupted by the appeal, we cannot reasonably understand the act as admitting the obstruction and delay resulting from appeal at an earlier stage of the proceeding."

Here is a plain declaration that the condemning corporation *in that case* could not take possession of the land of the defendant until after further action by the court; that is to say—*until "after final judgment of confirmation" of the report of the commissioners assessing damages. In that case a further order of the court was necessary, before the condemning corporation could exercise dominion and control over the land of the defendant.*

In the case at bar, the Postal Telegraph-Cable Company's counsel makes the following statement in his brief filed in this court on the 22d day of May, 1899, p. 4, namely:

* * * The motion was argued before that court " it Court of Appeals) " February 18, 1899, and decided 30, 1899, sustaining the motion, and dismissing the writ or for want of jurisdiction (opinion of Judge Morris, not orted, but printed on page 114 of original transcript of filed in this cause).

terwards, Judge Goff made an order reinstating the order of Judge Simonton for the appointment of com- ners, and directing the clerk to summon the commis- , upon notice to the parties, for the purpose of assessing mages to which the railway company was entitled, which ccordingly done, and the damages were assessed pur- to said order on the 21st day of April, 1899, and their was filed with the clerk of the court, as directed by the of Judge Simonton, of September 15, 1898. And im- ely upon the filing of the report, the telegraph company o the clerk, for the Southern Railway Company, the t of damages assessed by said commissioners, taking his therefor, and at once commenced the construction of graph line, as authorized under section 1946 of the Code rth Carolina, and continued on said work until inter- by *supersedeas* upon the writ of error now pending in urt."

ther comment cannot more widely differentiate the f Telegraph Co. v. W. C. & A. R. R. Co., 83 N. C., 420, he case at bar.

2. *Commissioners* v. *Cook County*, 86 N. C., 18, was a pro- g to condemn land for the construction of a fence in county.

defendant appealed from an order appointing commis- to assess damages, and the court, in dismissing the ap- ommented, at pp. 19-20, upon the fact that an appeal wholly needless in this incipient stage for the protection right or interest of the unwilling land-holder"—*in that*

o. 3, *Railroad Company* v. *Warren*, 92 N. C., 620, no l damage or injury could result to the defendant by ing his appeal until after final judgment.

No. 4, *Hendricks* v. *Railroad*, application was made by a owner for the appointment of commissioners to determine amount of compensation which should be paid him as ages for the construction of a railroad across his land, h railroad *had already been constructed.*

xton v. *North River Bridge Co.*, 147 U. S., 337, was cited he Circuit Court of Appeals in its opinion in the case at

deed, this was one of the cases, perhaps *the case*, mainly d on by the defendant in error in support of the position an order appointing commissioners in a condemnation eeding is not, and in the nature of things cannot be, a or appealable order—one upon which error will lie.

far from being authority for this proposition, the case directly sustains the position for which we contend, to- That the appealable character of such an order depends its real character and effect, and this depends upon the s, character, and effect of the eminent domain statute r which such commissioners are appointed. This is almost erms the opinion and decision of this honorable court in *ton* v. *North River Bridge Co.* In this case, after a brief ew of the facts, the court, at the top of page 338, said:

t the threshhold of the case lies the inquiry whether the order of the it Court, appointing commissioners to assess damages for the taking by etitioner of the respondent's land, is a final judgment upon which a of error will lie. This depends upon the terms and effect of the act of poration of the petitioner by the Congress of the United States, taken nnection with the general railroad law of the State of New Jersey."

his paragraph seems to us clearly to mean that an order of rt appointing commissioners to assess damages may be a judgment upon which writ of error will lie; that the stion whether or not such order is such final judgment de- ds upon the "terms and effect of the act" under which the t of eminent domain is to be exercised; that, independ- y of and without regard to such "terms and effect," it can- be predicated of an order appointing commissioners in a demnation proceeding either that it is or that it is not a

nt. If we are correct in our view as to the posi-
by the court in this paragraph—and we do not
can be mistaken—then it would seem to follow:
the order of October 24, 1898, which is the order
n in the case at bar, and by which, as we have
adjudicated, without the entry of any further
court, the right of the Telegraph Company to con-
d of the Railroad Company and also its right to
te possession of said land and to erect its struc-
on—is really a final and appealable order, and

at no decision of any court, in any other case,
an order for the appointment of commissioners in
ion proceeding is not such final or appealable
applicable here, unless the statute construed in
is substantially identical in "terms and effect"
te under construction in the case at bar.

ion with these two propositions, it should be borne
:

judicial decision should be regarded as settling
not raised in the case in which such decision was

t of these two last propositions, it will readily ap-
Luxton case cannot be considered as decisive of
the order appealed from in the case at bar; for—
ce:

Congress, if constitutional, conferred a plain right
not fettered by any conditions precedent, and the
ad law of New Jersey seems to have been equally
nd unembarrassed in this respect; certainly, no
o the existence of such conditions precedent was
Luxton case: while, on the other hand, not only
tute of North Carolina under construction in the
mbody such conditions, but they are palpable and
the very face of the statute, and were expressly
n the answer of the defendant company. Upon
t only was this defense ruled out, but the court,

e very teeth of the statute, refused to allow the defendant
pany to support its answer by proofs upon this point.

the second place:

s we understand the opinion of the court in the Luxton
, it was contemplated and provided, by the New Jersey
ute therein construed, that the commissioners (appointed
he order from which appeal was taken) should make re-
in writing of their assessment of damages and file the
e; that either party could then appeal to the trial court
the decision of the commissioners, and have the dama-
ascertained by the verdict of a jury, upon which verdict
gment could be entered; and that the condemning corpor-
n could not take possession of the property of the land
er, if either party demanded a trial by jury, until after
trial and verdict and a judgment of court thereon. That
say: If neither party appealed to the trial court, from the
rd of the commissioners, the court would enter judgment on
r report; but, if either party appealed, then there would
trial by jury and a judgment on the verdict. *In no event
l the condemning corporation take possession of the property of
and owner, until after the entry by the trial court of an order
equent to the order appointing commissioners.*

We can hardly be mistaken in this view of the effect of the
utes construed in the Luxton case, nor of the opinion of
court construing them. The express provision of the New
ey statute is as follows:

* * * ; *provided*, that in no case whatever shall said
pany incorporated under this act enter upon or take pos-
ion of any land of any person or persons for the purpose
ctually constructing said railroad or of making any erec-
or improvements whatever, or otherwise appropriating
lands to the use of any company incorporated under this
until they have paid to the party or parties entitled to re-
e the same the amount assessed by the commissioners as
value of such land or damages, in case the report of the
missioners is not appealed from, or if the same is appealed

e amount which shall be found by the jury by
ie shall be tried."

n the Luxton case, on page 341, says:

And if a trial by jury should be had, by way of appeal from
f the commissioners, it must likewise be in the same court.
hout, from the application of the corporation for the ap-
missioners to assess damages to the owner of the land pro-
, until judgment upon the award of the commissioners, or
of a jury, assessing those damages, remains in the Circuit
ed States and under its supervision and control."

iat, under the New Jersey statute, the damages
not payable upon the mere award of the com-
r until after a judgment of the court, affirming
the verdict of a jury rendered on appeal there-
s equally clear, that the condemning corporation
tle, nor right of possession, nor of entry, nor any
r of appropriating to its purposes the land of the
il the damages thus affirmed by judgment of the
d to the party entitled.

in the Luxton case was taken from the mere
ing commissioners, and it is noticeable that the
ssing and determining against the final and ap-
cter of this order, applied the tests which it had
he first paragraph of its opinion above quoted.
it further holds, if we understand the opinion,
r was not a final one, *because*, as we have shown,
nothing. We quote:

ceedings in the Circuit Court of the United States, in the
er the title of the corporation in the land to be taken, nor
wner to damages for taking it, would be adjudicated or
e the return of the award of the commissioners, it neces-
der the acts of Congress and the decisions of this court,
ppointing commissioners was interlocutory only, and that
was prematurely sued out, and must be dismissed for want

vell to append a brief summary of the radical
rence between the Luxton case and the case at
s, that is, which are clearly made in the case at

bar, and which were not and could not have been made in the Luxton case, *e. g.*:

In *Luxton* v. *North River Bridge Co.*:

1. It was not claimed, and it was not true, that conditions precedent had to be adjudicated by the court before it could be determined whether the act of Congress authorized the condemnation of the property of the land owner.

2. It was not averred, and it was not true, that any circumstances existed which rendered an appeal necessary at that stage of the proceedings, for the protection of the rights of the land owner.

3. It was not averred, and it was not true that irreparable injury would result to the land owner from deferring the appeal.

4. It was not averred, and it was not true, that the condemning corporation could enter into possession and exercise dominion and control over the property of the land-owner before any further order of the court.

5. It was not averred, and it was not true, that the property sought to be condemned was already a great artery of commerce.

6. It was not averred, and it was not true, that the lives and limbs of travellers upon a great public highway would be imperilled by deferring the appeal.

7. It did not appear by sworn answer (and demurrer thereto) that the proposed condemnation "would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon,"—and that this might occur before any further order of the court.

Tested, then, by the principles clearly laid down by the court in the Luxton case, is it not clear not only that the orders appealed from in the two cases are world-wide apart in character and effect, but also that the order appealed from in the Luxton case was *not* a final or appealable order, and that the order appealed from in the case at bar *was* and *is* such final and appealable order?

HAS THE RAILWAY COMPANY THE RIGHT OF APPEAL.

But a single question remains to be considered, and this concerns not the merits of the case but the mode of procedure, *i. e.*, the course and right of appeal. In this regard, our position is, that:

The Railway Company was clearly entitled to appeal to this Honorable Court, from the decision of the Circuit Court of Appeals dismissing the writ of error in Southern Railway Co. v. Postal Telegraph-Cable Co.

The ground upon which the existence of such right may be questioned is the provision, embodied in Section 6 of the Judiciary Act of March 3, 1891, that, "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States,"—final orders of the Court of Appeals are absolutely final; that no appeal lies therefrom to this Honorable Court.

The provision has no application to the case at bar, for two reasons:

1st. The jurisdiction of the Circuit Court in the case at bar did not depend entirely upon citizenship, but the plaintiff Telegraph Company expressly claimed rights under the act of Congress, of July 24, 1866.

At pages 21–25 of the printed record will be found the amended petition of the plaintiff Telegraph Company, filed in the clerk's office of the Circuit Court of the United States for the Western District of North Carolina, on the 22nd day of July, 1898. Upon page 22 it charges that:

"The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by it, making complete telegraphic connections throughout the United States of America, Canada, and and Mexico, with cable connections to Europe. (As amended by order of the

court.) And the Postal Telegraph-Cable Co. has, as required by Section 5268 of the Revised Statutes of the United States of America, filed its written acceptance with Postmaster General of the United States, of all the restrictions and obligations by the Acts of Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government use of the same for military purposes."

At pages 40–42 of the record will be found a second petition of the plaintiff, filed in the office of said court on the 18th day of August, 1898, which contains the following averments:

"3. That said petitioner is chartered under the laws of New York with the authority to construct, maintain and operate its said lines throughout the U. S. including the State of N. C., and has applied with the acts of Congress approved July 24th, 1866, Revised Statutes, 5263 to 5269, as will fully appear by the certificate of the Post Master General shown to this Honorable Court, and is, therefore, authorized to construct its telegraph lines on all post-roads, and that said Railway Co's. right of way, is, under the acts of Congress, a post-road, and that said Telegraph Co. owns and operates connecting telegraph lines throughout the U. S. and Canada, with connecting cable lines across the Atlantic Ocean, and that it already has and operates telegraph lines in the said State of N. C., and that the line now proposed to be constructed upon the right of way of said defendant Railway Co., in said State will connect with its said lines heretofore constructed in said State, thereby making it a part of the great system of its lines extending throughout the U. S. as aforesaid, and that it is engaged in interstate commerce. * * *

"5. Petitioner avers that under the Acts of Congress aforesaid, it is entitled to the right, without obstruction, hindrance or delay, to construct its telegraph lines as prayed for in said petition" * * * *

The petitioning plaintiff, by its counsel, vigorously prosecuted and pressed its rights and claims under the Act of Congress, thus asserted, and the Honorable Circuit Court passed upon and denied them. What it had to say upon this phase of the case may be found at page 33 of the record.

It is clear, then, that the jurisdiction of the Circuit Court in the case at bar *did not depend upon diverse citizenship alone*.

2nd. This Court has recognized a construction of Section 6 of the Judiciary Act of March 3, 1891, to the effect that, although the plaintiff below may have proceeded in the trial court upon the ground of diverse citizenship alone; yet, if a federal question was actually involved in the case, the right of appeal from the decision of the Court of Appeals to this Court exists.

The logical outline of the established doctrine upon the vexed question of the jurisdiction of the Supreme Court over final orders of the Circuit Court of Appeals, so far as applicable to the case at bar, is substantially as follows:

"Congress intended to confer upon this court jurisdiction to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question of the finality of its judgment under section six of the act of March 3, 1891." *Aztec Mining Co.* v. *Ripley*, 151 U. S., 79.

This jurisdiction is to be exercised upon appeal or by *certiorari*—the entire structure of the act and the tenor of the cases construing it, showing that the presumption is in favor of the jurisdiction by appeal. It is, however, indispensable to the existence of this appellate jurisdiction that there should actually be a federal question involved in the case.

It is a further indispensable requirement, that it shall appear from the plaintiff's own statement of his claim, that the case is one arising under the Constitution, laws or treaties of the United States. It is not sufficient that the defendant shall make such statement, or that the federal question in the case shall be otherwise developed or appear in the course of the proceedings in the case. See *Press Publishing Co.* v. *Monroe*, 164 U. S., 105, 110, 112. See also in this connection *Tennessee* v. *U. P. Bank*, 152 U. S., 454; *Chappel* v. *Waterworth*, 155 U. S., 102, 107–8; *Oregon Short Line Ry.* v. *Skottowe*, 162 U. S., 490, 494–5.

But finally, it is not required that the plaintiff shall vouch and rely, exclusively and only, upon the federal feature of his case as the ground upon which he invokes the jurisdiction of the court. As was said by this court in *The Mayor* v. *Cooper*, 6 Wall., p. 252: "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of

jurisdiction." See also *Tennessee* v. *Davis*, 100 U. S., p. 270, and *Union Pacific Railway* v. *Harris*, 158 U. S., 327–8.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error.

IN THE

upreme Court of the United States.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.
vs.
THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

MEMORANDUM WITH APPELLANT'S BRIEF RESISTING MOTION TO VACATE OR MODIFY SUPERSEDEAS.

ge 7 of Appellant's above mentioned brief contains the wing statement:

The record from the Circuit Court of Appeals reached the k's office of this court Saturday, May 20th, 1899, and has not en printed, but the necessary fees were paid May 22, 1899, and ause then docketed as No. 832, October Term, 1898. It now ls as No. 303, October Term, 1899."

ne record referred to in this statement was the only one in existence, to wit: the original transcript furnished by clerk of the Circuit Court of Appeals, partly printed and ly type-written. To our surprise, on Friday, October 6th, after our brief was printed and in the hands of opposing sel, we received, from the clerk of this court, a copy of the rd as printed in and for this court.

order to harmonize the references in our brief and to er them readily available, in connection with the record rinted for this court, it is only necessary to say that the s referred to are identical with the marginal pages in the rd as printed for this court.

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Southern Railway Company.

Office Supreme Court U. S.
FILED
OCT 16 1899

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Oct. 16, 1899

No. 203.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

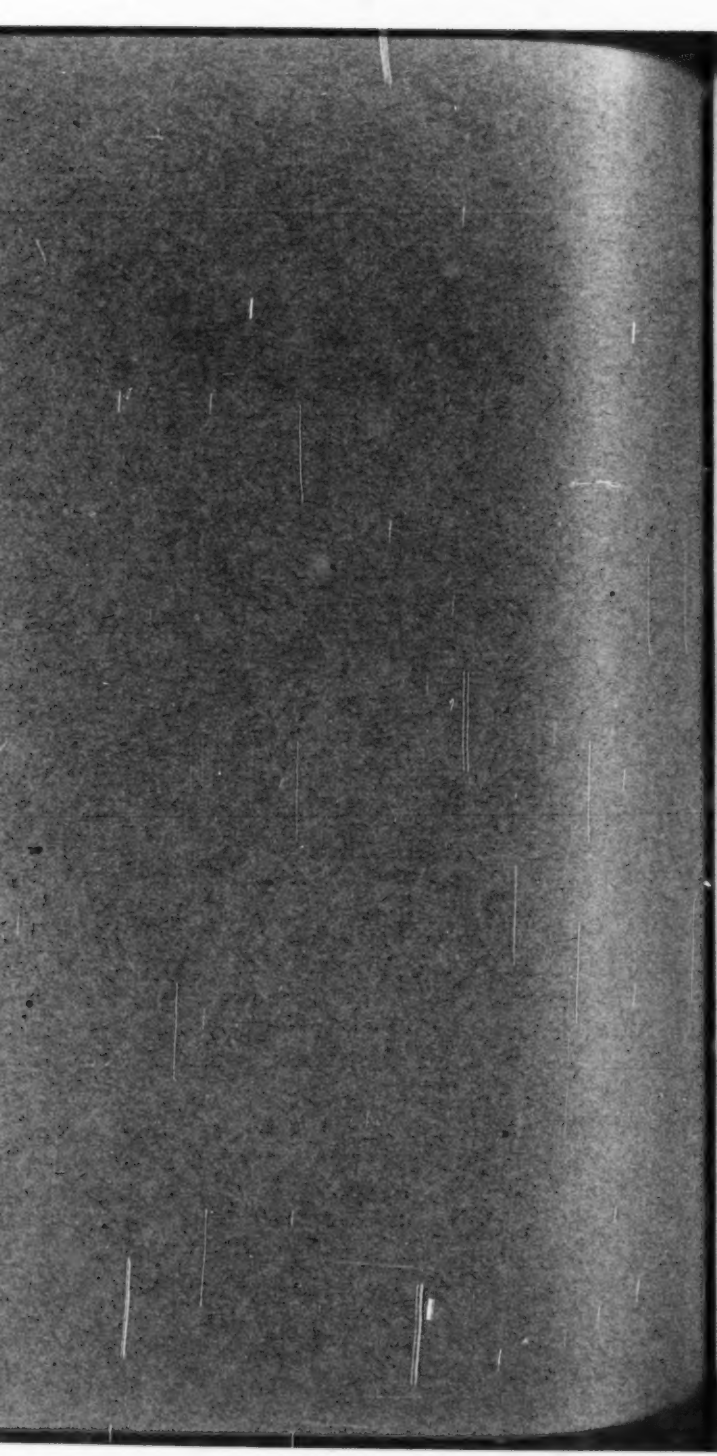
THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals,
Fourth Circuit.

Brief for Plaintiff in Error,
OCTOBER 16, 1899.

Points Assigned by the Plaintiff in Error why the Motion of the Defendant in Error, to Dismiss the Writ of Error or to Modify the Supersedeas heretofore Granted, Should be over-ruled and the cause heard upon its merits when reached on the Court docket.

ROBERT STILES, RICHMOND, VA.,
ADDISON L. HOLLADAY, RICHMOND, VA.,
Counsel for Plaintiff in Error.



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OCTOBER TERM, 1899.

No. 303.

E SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

---

to the United States Circuit Court of Appeals,
Fourth Circuit.

Brief for Plaintiff in Error,
OCTOBER 16, 1899.

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ssigned by the Plaintiff in Error why the Motion
efendant in Error, to Dismiss the Writ of Error
Modify the Supersedeas heretofore Granted,
uld be over-ruled and the cause heard upon
merits when reached on the Court docket.

ollowing notice of a motion to be made by the defen-
error, the Postal Telegraph-Cable Company, in the
yled cause in this Honorable Court on the 16th day of
, 1899, has been served on the undersigned counsel for
ntiff in error, the Southern Railway Company (caption
motion being omitted), viz:

Motion by the Defendant in Error to Dismiss.

mes the defendant in error, the Postal Telegraph-Cable Company,
McIntosh, counsel, and moves the court to dismiss the writ of error
ause, (1) because this court has no jurisdiction of the same:
e motion is not sustained, then that the supersedeas upon the
rror from this court be modified, so that during the pendency of the
ill not prevent or hinder the defendant in error from occupying the
appropriated for its use and proceeding to erect and operate its
legraph thereon pending said writ of error.

(Signed) J. R. McINTOSH,
Attorney for Defendant in Error.

s. STILES & HOLLIDAY,
Attorneys of Record for Plaintiff in Error in the above entitled case:

e hereby notified that the defendant in error in the above named
ll, on Monday, the 16th day of October, A. D., 1899, on the meeting
upreme Court of the United States, on that day, or as soon thereafter
el can be heard, submit for the consideration of the court the fore-
otion, and the brief thereon hereto attached.

(Signed) J. R. McINTOSH,
Atty. for Defendant in Error.

May 19th, 1899, counsel for the Postal Telegraph-Cable
any caused notice to be served on counsel for the Southern
y Company, that the above motion would be made be-
is honorable court on May 22, 1899.

May 22, 1899, counsel for the plaintiff in error appeared,
y leave of court, filed a printed brief, respectfully sub-
g that the notice of said motion was illegal and unsuffi-
and on the same day the defendant in error appeared
nsel before this court, and—while submitting the above

thdrew its motion to dismiss the writ of error allowed
ff in error; but moved the court to vacate or modify
eas.

norable court adjourned without action upon appel-
n.

ber 10, 1899, counsel for the Southern Railway Co.
f court) filed a printed brief of fifty pages, resisting
motion to vacate or modify the supersedeas in this
in that brief necessarily discussed the question of
presented by the present motion of the appellee.

**ted brief filed for the plaintiff in error on October
ontained the following statement on page 8, viz:**

the ruling of this court in *Bohanan* v. *Nebraska*,
231, and other like cases, that 'the court will not con-
nerits of the question involved in a case on a motion
unaccompanied by a motion to affirm'—we cannot
appellee's motion to vacate the supersedeas awarded
se, discuss the merits of the controversy—*i. e.*, the
al proposition of appellant that there is no law in
nder which a telegraph company may, in North
ondemn a right of way for its purposes upon the
d constituting the roadway of a railroad; the con-
appellant that, by legislation subsequent to the
the Code of North Carolina of 1883, the legislature
te has repealed (as to telegraph condemnations) the
er which appellee founds its application to condemn
y of appellant. These, with many other vital ques-
to the merits of the controversy, presented in the
of errors, must await a hearing upon the merits.
counsel will endeavor to avoid violation of the rule
in *Bohanan* v. *Nebraska*, 118 U. S., 231; but, in re-
ellee's motion to vacate the above supersedeas, it
cessary to analyze the orders of the Circuit Court
eptember 15, 1898, and October 24, 1898, and show
determine upon their face, in order to demonstrate

appellant's contention that the order of October 24, 1898, was a final order, and that a supersedeas properly followed a writ of error thereto."

Having, in our brief filed October 10, 1899, fully discussed the jurisdiction of this court and the finality of the order to which a writ of error and supersedeas have been allowed and perfected, and having in that brief answered all the points discussed in appellee's brief, which accompanies its motion now made (October 16, 1899), it would be a work of supererogation to go over the same ground a second time. We therefore adopt our brief filed October 10, 1899, and ask this honorable court to consider and treat that brief as the reply of the plaintiff in error, the Southern Railway Company, to the brief of the defendant in error, the Postal Telegraph Cable Company, which accompanies its said motion of October 16, 1899.

The record in this cause, marginal page 96, shows that on November 29, 1898, the Circuit Court, held by the Honorable Nathan Goff, Circuit Judge, allowed a writ of error and supersedeas from the Circuit Court to the Circuit Court of Appeals, which was duly perfected (see marginal pp. 102 to 109, inclusive), and, during the whole pendency of that appeal in the Circuit Court of Appeals, the writ of error operated as a supersedeas, as may be seen from the record including the order of the Circuit Court of Appeals signed by Honorable Nathan Goff, the presiding Judge (record, marginal page 120), from which the following extract is made:

"This cause having been called in the regular order for argument and the defendant in error having moved the court to dismiss the writ of error, the said cause was argued generally, by counsel, on the transcript of the record as well as upon the motion to dismiss."

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond

in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error to operate as a supersedeas—from the Circuit Court to the Circuit Court of Appeals—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a superdeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein.

No question has been raised by the defendant in error either as to the amount of the supersedeas bond or the sufficiency of the security thereon. A vacation or modification of the supersedeas to-day, or at any future time, prior to a hearing upon the merits, would subject the plaintiff in error to irreparable injury; and the construction of the telegraph lines of the defendant in error pending the appeal, would, as stated in the answer of the Southern Railway Company, to which the Postal Telegraph-Cable Company demurred—"grossly imperil the safe operation of defendant's railroad and grossly obstruct or hinder the usual travel thereupon."

We respectfully submit that it was right and proper that the writ of error from the Circuit Court to the Circuit Court of Appeals should operate as a supersedeas while the cause was pending in that court, and in view of the action taken by Judge Goff in granting the writ of error to operate as a supersedeas from the Circuit Court of Appeals to this Honorable Court with full knowledge of all facts and circumstances connected with the case in its various aspects, and of the legal effect of the order of the Circuit Court of October 24th, 1898,

upon the rights and property of appellant, that this Honorable Court should not dismiss the writ of error and should not vacate or modify the supersedeas, but should permit the case to come to a hearing upon the merits.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error

October 16, 1899.

(17,417.)

FILED
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JAMES H. McKENNEY,
CL

IN THE

Supreme Court of the United States.

October Term, 1899.

Filed April 6, 1900.

No. 803

SOUTHERN RAILWAY COMPANY,

Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY,

Defendant.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Plaintiff in Error.

ROBERT STILES, RICHMOND, VA.,
ADDISON L. HOLLADAY, RICHMOND, VA.,
Counsel for Plaintiff in Error.

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EXPLANATORY PREFACE.

ief is so arranged under headings, and so analyzed
lex, that the reader may readily turn to the discus-
at topic which for him is the point of interest or of
in the cause, avoiding what he may regard as not
elucidation or argument.

s, orders and authorities are so listed, indexed and
at they may be read or passed at pleasure.

ff in error grounds its defense on the merits upon the
f any legal basis or authority for the proceeding of
i. e., appellant denies the right of the Telegraph
to condemn a right of way for telegraph purposes
property of the Railway Company.

ors of procedure appellant submits that the Superior
Guilford county was without jurisdiction of the pe-
d by the Telegraph Company, and that the Circuit
the United States for the Western District of North
had no greater jurisdiction than the State Court from
id petition and proceeding were removed, and that
edings of the Circuit Court have been in violation of
State or Federal, now in force.

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(17,417.)

IN THE

Supreme Court of the United States.

October Term, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY,

PLAINTIFF,

vs.

POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Plaintiff in Error.

STATEMENT OF CASE.

On June 11, 1898, the Postal Telegraph-Cable Company, hereafter called the Telegraph Company, a New York corporation having accepted the provisions of the Act of Congress, approved July 24, 1866, entitled: "An act to aid in the construction of telegraph lines, and to secure to the government

the use of the same for postal, military and other purposes," filed in the office of the clerk of the Superior Court of Guilford county, North Carolina, a petition making the Southern Railway Company, hereinafter called the Railway Company, the sole defendant, in which petition the Telegraph Company asked the condemnation, for its purposes as a telegraph company, of a continuous right of way along, upon and over the lands (roadway) of the Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad crosses the State line; thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, and Mecklenburg to Charlotte, and from the town of Greensboro, in the county of Guilford, to the city of Raleigh, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, and by an amended petition filed the same day, asked for a like condemnation from Greensboro, North Carolina, to Winston, in Forsythe county, North Carolina—the whole distance being nearly two hundred and fifty miles, and the larger part of the property sought to be condemned being situated within the Western District of North Carolina. See pp. 3–6 and 18–22 of record, the reference to section 5268 U. S. Rev. Stat, being on p. 19.

A summons was issued requiring the Railway Company to appear before the clerk of the Superior Court of Guilford county on the 22nd day of June, 1898, and answer, and on that day the Railway Company entered a special appearance for that purpose, and filed a petition and bond, for the removal of the proceeding to the Circuit Court of the United States for the Western District of North Carolina. Upon the same day, said petition and bond were presented to said Court and application made to it by counsel for the Railway Company to enter an order removing the cause to the Circuit Court of the United States; but the State Court denied the application to remove, and made an order requiring the Railway Company to answer. Thereupon, the Railway Company procured a transcript of the record from the clerk of the State Court and filed

e same in the clerk's office of the Circuit Court of the United ates at Greensboro, N. C., on June 25th, 1898.

Subsequent to June 22, 1898, the Telegraph Company sought take further action in the State court in said proceedings to ndemn, and upon a bill filed by the Railway Company in e Circuit Court of the United States at Greensboro, a re-aining order was granted prohibiting further prosecution of e cause in the State court.

The Telegraph Company moved the Federal court to remand d proceeding to the State court, and the Railway Company ved said Federal court to continue the restraining order in ce as an injunction. These motions were argued at Ashe-le on or about the 14th day of July, 1898, and on the 20th July, 1898, the court filed its written opinion, refusing to mand the proceeding to condemn to the State court, and lding that the restraining order must be continued in force til the further order of the court.

On August 18, 1898, the Telegraph Company asked leave of e Federal court to file another petition in which it took the ound that it had a right under the above Act of Congress July 24, 1866 to construct its telegraph lines "without ob-ction, hindrance or delay." The court continued this appli-ion until August 31, 1898, and then allowed this petition to filed.

On August 31, 1898, the Railway Company filed its written tion to dismiss said petitions of the Telegraph Company d each of them, assigning sixteen grounds therefor. See ord, pp. 81–85, inclusive. The motion to dismiss was over-ed, as to petition filed in the Superior Court of Guilford nty, by order erroneously dated August 31, 1898. See ord, p. 24, "Defendant's Bill of Exceptions, No. 1," record 25–26, and opinion, pp. 26–33.

On September 15, 1898, the Circuit Court made an order by ich it directed Samuel L. Trogdon, clerk of that court at eensboro, N. C., to appoint three commissioners to assess mages, prescribed their powers and duties, and otherwise

ordered as set out in said order, the full text of which may be found at page 16 of this brief. See record, p. 36, and "Defendant's Bill of Exceptions, No. 2," pp. 39–40.

On September 19, 1898, Samuel L. Trogdon, clerk, made an order appointing three commissioners to assess damages, and fixing the time and place for their first meeting, and on the same day issued a paper notifying appellant of his action in the premises. See record, pp. 37–38, and "Defendant's Bill of Exceptions, No. 2," pp. 39–40.

These orders were made upon application of counsel for the Telegraph Company, without notice to or knowledge of counsel for the Railway Company. Immediately upon hearing of said orders, counsel for the Railway Company brought the matter to the attention of the court, and an order was made by the court on September 23, 1898, suspending the order of September 15, 1898, and requiring the Telegraph Company to show cause on October 7, 1898, why the Railway Company should not be permitted to file its answer and have the order of September 15, 1898, vacated and annulled. See record p. 40.

On October 7, 1898, the parties plaintiff and defendant, by their attorneys, appeared before the court, and the Railway Company tendered and asked leave to file its answer. The court, over the written objection of the Telegraph Company, (record pp. 54–55), announced its purpose to allow the Railway Company to file said answer, which will be found at record pp. 41 to 55, and the Telegraph Company demurred *orally* to said answer, but the order filing said answer and noting said demurrer was not made until October 24, 1898. See record pp. 58–59*

The oral demurrer to the answer of the Railway Company was argued October 7, 1898, and on October 17, 1898, the court filed a written opinion sustaining this demurrer. See record pp. 56–58.

* The paper headed "Demurrer to Defendant's Answer," record pp. 54, 55, was really the answer tendered by the Telegraph Company to the order of September 23, 1898, requiring that Company to show cause. It was not the demurrer. The heading is erroneous.

On October 24, 1898, the court made an order filing the an-
er of the Railway Company, noting the demurrer of the
egraph Company and sustaining said demurrer. *The Rail-
y Company then asked leave to introduce testimony sustaining the
rments of its answer, but the court in said order overruled this
ion and refused to permit the Railway Company to introduce testi-
ny.* The court also reinstated its order of September 15,
8. To all of which ruling the Railway Company excepted.
order of court pp. 63–64 and defendant's bill of exceptions,
2 and 3, pp. 39, 40, 62.

On October 24th, 1898, the Railway Company asked for a
t of error and supersedeas to the order of October 24, 1898.
s application, on the motion of the Telegraph Company, was
tinued until November 4, 1898. See order record p. 74,
neously headed "Order Refusing Appeal." On November
898, a petition for an appeal, together with an assignment
rrors, was presented to the Circuit court, and will be found
pp. 66–72 record. On November 9, 1898, the court filed an
nion and made two orders, one of which recited the facts
above stated, and the other refused the Railway Company
writ of error prayed by it. See record pp. 72–75.

n November 29, 1898, the Circuit Court set aside the last
ntioned order and allowed the writ of error and supersedeas
rayed in the assignment of errors theretofore filed. See
rd p. 80.

n the 30th of March, 1898, the Circuit Court of Appeals
l an opinion, holding that no appealable order had been
le by the Circuit Court, and on March 31, 1899, made an
er dismissing the writ of error for want of jurisdiction.
cause was then brought by writ of error to this court,
proper bond having been given, the writ of error operated
supersedeas; but, upon application of the appellee, this
rt, in October, 1899, vacated the supersedeas.

The court, however, refused to dismiss the writ of error, after full argument on the point, and we take that action to be a final adjudication that THE ORDER OF OCTOBER 24, 1898, WAS A FINAL ORDER.

We deem it most conducive to the convenience of the court to insert just here, in consecutive order, under two heads, and extending continuously from this point to page 16 of this brief all the

STATUTES OF NORTH CAROLINA TO WHICH REFERENCE WILL BE MADE THROUGHOUT THIS ARGUMENT.

First. Statutes governing condemnations by Railroad Companies.

Section 1944 of North Carolina Code of 1883.

The first paragraph of section 1944 is as follows: the balance being, for the purpose in hand, unimportant, is omitted.

"Sec. 1944. PETITION PRESENTED; CHARACTER OF; NAMES AND PLACES OF RESIDENCE TO BE GIVEN; COPY OF PETITION MUST BE SENT TO SUPERIOR COURT. 1871–'2, c. 138, s. 14.

"For the purpose of acquiring such title the said Company, or the owner of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal to the superior court of the county in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly

rated, and that it is the intention of the company in ith to construct and finish a railroad from and to the amed for that purpose in its articles of association, or arter; that the whole capital stock of the company has good faith subscribed, as required by this chapter, or erms of its charter; *that the company has surveyed the oute of its proposed road, and made a map or survey thereof, such route or line is designated, and that they have located d road according to such survey, and filed such certificates ocation, signed by a majority of the directors of the company, rk's office of the several counties through or into which the d is to be constructed;* that the land described in the peti- equired for the purpose of constructing or operating osed road; and that the company has not been able to title thereto, and the reason of such inability. The , whether filed by the company or the owner of the ust also state the names and places of residence of the so far as the same can by reasonable diligence be ascer- who own or have, or claim to own or have, estates or s in the said real estate; and if any such persons are their ages, or as near as may be, must be stated; and uch persons are idiots or persons of unsound mind or nown, that fact must be stated, together with such other ons and statements of liens or incumbrances on said ate as the company or the owner may see fit to make. of such petition, with a notice of the time and place, nd where, the same shall be heard by the superior ust be served on all persons whose interests are to be by the proceedings, at least ten days prior to the hear- he same by the said court."

Section 1945 of Code.

n 1945 is as follows:

945. ALLEGATIONS MADE AGAINST PETITION; FREEHOLD-OINTED TO APPRAISE ESTATE. 1871–'2, c. 138, s. 15.

On presenting such petition to the superior court as aforesaid, h proof of service of a copy thereof, and notice as afore- l, all or any of the persons whose estates or interests are to affected by the proceedings, may answer such petition and w cause against granting the prayer of the same, and may prove any of the facts alleged in it. *The court shall hear the ofs and allegations of the parties, and if no sufficient cause is wn against the granting the prayer of the petition, it shall make order for the appointment of three disinterested and competent eholders* who reside in the county where the premises are to appraised, for the purposes of the company, *and shall fix the e and place* for the first meeting of the commissioners."

Section 1946 of Code.

Section 1946 is as follows:

"Sec. 1946. COMMISSIONERS TO BE QUALIFIED TO ISSUE SUB-ENAS, ADMINISTER OATHS, TO ADJOURN, TO APPRAISE AND REPORT DER HANDS AND SEALS; EITHER SIDE MAY FILE EXCEPTIONS FORE CLERK; MAY APPEAL; UPON PAYMENT OF SUM APPRAISED, MPANY TO ENTER AND TAKE POSSESSION DURING APPEAL; FINAL DGMENT; COURT TO HAVE POWER TO ENFORCE JUDGMENT; LAND BELONG TO COMAANY DURING ITS CORPORATE EXISTENCE; POS-SSION OF LAND NOT CONDEMNED TO BE SURRENDERED TO OWNER, .; COSTS AT THE DISCRETION OF JUDGE OR COURT. 1871-'2, C. 8, ss. 16, 17, 18.

"The commissioners, before entering upon the discharge of eir duties shall take and subscribe an oath that they will irly and impartially appraise the lands mentioned in the peti-on. Any one of them may issue subpœnas, administer oaths witnesses, and any two of them may adjourn the proceedings efore them from time to time, in their discretion. Whenever ey meet, except by the appointment of the court or pursuant adjournment, they shall cause ten days' notice of such meet-g to be given to the parties who are to be affected by their roceedings, or their attorney or agent. They shall view the

escribed in the petition, and hear the proofs and of the parties, and reduce the testimony, if any is hem, to writing; and after the testimony is closed e, and without any unnecessary delay, and before to the examination of any other claim, a majority being present and acting, shall ascertain and deter- mpensation which ought justly to be made by the the party or parties owning or interested in the ppraised by them; *and in determining the amount of sation they shall not make an allowance or deduction on ny real or supposed benefits which the parties in interest rom the construction of the proposal railroad.* They the same to the court under their hands and seals, twenty days after filing the same any person inter- said land may file exceptions to said report, and termination of the same by the court, either party edings may appeal to the court at term, and thence, ent, to the Supreme court. The court or judge on may direct a new appraisal, modify or confirm the ake such order in the premises as to him shall and proper. If the said company, at the time of al, shall pay into court the sum appraised by the ers, then and in that event the said company may possession of, and hold said lands, notwithstanding y of the appeals, and until the final judgment ren- id appeal or appeals. And if there shall be no ap- he final judgment rendered upon said petition and , shall be in favor of the company, and upon the said company of the sum adjudged, together with d counsel fees allowed by the court, into the office of the superior court, then, and in that event, all have been made parties to the proceedings shall and barred of all right, estate and interest in such during the corporate existence of the company A certified copy of said judgment under the seal shall be registered in the county where the land

is situate, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings, as deeds for land are now allowed to be read in evidence. All real estate acquired by any company under and pursuant to the provisions of this chapter, for the purpose of its incorporation, shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to said company. And the company shall have no right to hold said land not condemned, but shall surrender the possession of the same on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. The costs in this proceeding shall be paid by either party as the judge or court in its discretion shall adjudge. The commissioners shall each be entitled to three dollars per day for each day they are engaged in the performance of their duties, and the same shall be taxed in the bill of costs."

Section 1952 of Code.

Section 1952 is as follows:

"SEC. 1952. MAPS OF ROUTE TO BE MADE; NOTICE GIVEN TO OCCUPANTS OF LAND; SUPERIOR COURT PETITIONED WHEN ROUTE IS OBJECTIONABLE; NO ALTERATION OF ROUTE ALLOWABLE, UNLESS, &c.; TIME OF CERTIFICATE; COMPENSATION. 1871–'2, c. 138, s. 24.

"Every company, before constructing any part of their road into or through any county named in their articles of association or charter, shall make a map and profile of the route intended to be adopted by such company in such county, which

shall be certified by the president and engineer of the company or a majority of the directors and filed in the office of the clerk of each county through which the road is to be made. The company shall give a written notice to all actual occupants of the land over which the route of the road is so designated and which has not been purchased by or given to the company of the route so designated. Any party feeling aggrieved by the proposed location may, within fifteen days after receiving notice as aforesaid, apply to the superior court by petition duly verified, setting forth his objections to the route designated, and the said court may, if it considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and after hearing the parties, to affirm or alter the same as may be consistent with the just rights of all parties and the public, but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall within thirty days after their appointment be made and certified by them and the certificate filed in the office of the county clerk. Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment, and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid."

Sections 1944, 1946 and 1952 have been amended or changed by the following Acts:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

Sec. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "*Provided, however*, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

Sec. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

Chapter 396, pages 391-2, Acts 1893.

"An act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

"*The General Assembly of North Carolina do enact:*

"Sec. 1. That section one thousand nine hundred and forty-four of chapter forty-nine of the Code be amended by striking out in said section all from the word 'charter' in line sixteen of said section down to and including the word 'constructed' in line twenty-four thereof.

"Sec. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purposes of a railroad that at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the

land so sought to be condemned, and at what points on such land such cuts and embankments are located.

"Sec. 3. That section one thousand nine hundred and fifty-three of chapter forty-nine of the Code be amended by striking out from the word 'thereby' in line four down to and including the word 'change' in line seven of said section.

"Sec. 4. That this act shall not affect any pending litigation.

"Sec. 5. That this act shall be in force from and after its ratification.

"Ratified the 6th day of March, A. D. 1893."

Language Stricken from Section 1944 by Acts of 1893.

In other words, the Legislature amended and changed Section 1944 by striking out the following words, viz:

"That the Company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

Language Stricken from Section 1946 by Act of 1891.

And the Legislature amended and changed section 1946, by striking out the words first below quoted; with a saving clause or proviso quoted lower down in italics, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

Section 1952 was repealed and the second section of chapter 396, pages 52-53, Acts of 1893, copied above, substituted in lieu thereof.

Second. Sections of the Code of North Carolina, edition of 1883, governing condemnations by Telegraph Companies.

"Sec. 2007. TELEGRAPH LINES, WHO MAY MAINTAIN. 1874–'5, c. 203, s. 2.

Any telegraph company chartered or incorporated by this or any other state shall have the right to construct, maintain and operate lines of telegraph along any railroad or other public highway in the State of North Carolina, but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway."

"Sec. 2009. ENTITLED TO RIGHT OF WAY UPON JUST COMPENSATION. 1874–'5, c. 203, s. 4.

"Such telegraph company shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles and establish offices, upon making just compensation therefor."

"Sec. 2010. PROCEEDINGS TO BE BY PETITION; FACTS TO BE STATED. 1874–'5, c. 203, s. 5.

"Whenever such telegraph company shall fail on application therefor to secure by contract or agreement such right of

way for the purposes aforesaid over the lands, privilege, or easement of another person or corporation, it shall be lawful for such telegraph company, first giving security for costs, to file its petition before the Superior Court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant: Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easem
right of way extends."

nt or

Sec. 2011. COPY OF PETITION AND NOTICE TO BE SERVED ON PERSONS CLAIMING LANDS, &C., 1874–'5, C. 293, S. 6.

"A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the person or persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. If the person on whom the service is to be made be a corporation, it shall be sufficient if notice be served on an officer or agent of the corporation found in the county in which the land or easement is situated, or upon any other officer of the corporation."

Sec. 2012. PROCEEDINGS FOR CONDEMNATION, APPOINTMENT OF COMMISSIONERS, THEIR REPORT, EXCEPTIONS THERETO; APPEAL.

FINAL JUDGMENT, &C., TO BE AS PROVIDED IN THIS CHAPTER IN CONDEMNING, &C., FOR RAILROADS.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

Sec. 2013. COMMISSIONERS MAY INSPECT THE PREMISES. 1874–'5 c. 203, s. 9.

"In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on testimony as to them may be satisfactory, and the costs of the proceeding shall be paid by the petitioner, unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

THE THREE SUBSTANTIVE AND CRUCIAL ORDERS ENTERED IN THE PROGRESS OF THE PROCEEDINGS IN THE TRIAL COURT.

The orders of the Circuit Court dated September 15, 1898, and October 24, 1898, are as follows:

Order of September 15, 1898.

"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this dis-

ct, and summons them before him. That the said persons selected shall act as commissioners to assess the dama- which the Southern Railway Company may sustain reason of the erection of the telegraph poles and the stretch- of the wires thereon of the Postal Telegraph-Cable Com- y, as proposed in the petition of said Company to this rt. That the said commissioners shall take before the said rk the oath prescribed in section 1946 of the Code of North rolina, and shall proceed in all respects as required in said le in assessing such damages, estimating and assessing such npensation as may be just for said Southern Railway Com- y by reason of the premises. The said commissioners ll hold their meetings in the courthouse of the United tes, in the city of Greensboro, over which meetings said rk shall preside, and they are authorized and empowered ake such testimony in respect to the said damages to the d Southern Railway Company as they may deem perti- nt, not, however, extending their inquiry as to the benefit be derived by the Telegraph Company, or the value reof, to it: The first meeting of the commissioners, of ich the said clerk shall give due notice to them and to the ties, shall be held ten days after notice of their appoint- nt has been served on the parties to this cause.

After hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, l sign and seal the same and file it with the said clerk of s court at Greensboro." See record, p. 36.

Order of October 24, 1898.

This day came the defendant Railway Company and by ve of court filed its answer to the complainant's written ice and motion to which said answer the plaintiff Telegraph mpany demurred, and after argument of counsel, and the tter being duly considered by the court, said demurrer is eby sustained, and the defendant having asked leave to

introduce testimony sustaining the averments of its answer which leave was refused by the court—

"It is therefore ordered, that the former order made by this court directing the clerk of this court, at Greensboro, North Carolina, to appoint commissioners to assess the damages in the above entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order, for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts." See record, pp. 58–59.

The order by which Sam'l L. Trogdon, Clerk, appointed Commissioners to Assess Damages, omitting caption, record p. 37, is as follows:

"*To Alfred M. Scales, John M. Walker, and J. Addison Hodgin:*

"Pursuant to an order made by His Honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to summon three disinterested freeholders as Commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by the reason of the construction of a line of telegraph along the right of way by the plaintiff, the Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court room of the U. S. Circuit Court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

(Signed.) SAM'L L. TROGDON,
Clerk.

[Seal.]

QUESTIONS ADJUDICATED.

e Circuit Court by its order of October 24, 1898.

. Determined that North Carolina statutes are in force
ler which the telegraph company may condemn a right
vay for its purposes upon the property of the railroad.
. Prohibited testimony showing the value for telegraph
poses of the property to be condemned.
. Determined that the condemned right of way for tele-
ph purposes may be unfixed, shifting and changing as to
ation.
. Determined that the entire condemnation may be had
one proceeding upon a strip of land, much of which is
d in fee-simple (by the railway company) belonging to a
gle owner and extending through twelve different counties
istance of nearly two hundred and fifty miles.
. Determined upon demurer that every defense set up in
answer of the railway company is without merit, even
ugh it were proved by conclusive evidence.
. Refused to hear proof as required by section 1945 of the
le of North Carolina.
. Determined without proof conditions precedent to con-
nnation under the North Carolina statutes.
. Delegated to its Clerk the power of selecting and ap-
nting commissioners to assess damages and authorized
Clerk to preside over such commissioners.
. Delegated to its Clerk powers vested in the court and
he court only.
o. Determined that the telegraph company may condemn
e possession of, construct its lines upon, exercise domin-
over and use the land of the railway company before the
ry of any further order by the court.

MERITS.

The Railway Company grounds its defence on the merits,

upon the absence of any legal basis or authority for the proceeding of the Telegraph Company; *i. e.*, the Railway Company denies the right of the Telegraph Company to condemn a right of way for telegraph purposes upon the property of the Railway Company.

ERRORS OF PROCEDURE.

(*a*) The Railway Company submits that the Superior Court of Guilford county was without jurisdiction of the petition filed by the Telegraph Company, and that the Circuit Court of the United States for the Western District of North Carolina had no greater jurisdiction, in the premises, than the State Court from which said petition and proceeding were removed.

(*b*) If, however, this honorable court should hold that legal authority exists for the condemnation by the Telegraph Company of a right of way for its purposes upon the property of the Railway Company, and that the State Court and the United States Circuit Court lawfully entertained jurisdiction of the proceeding, yet the Railway Company submits that the proceedings of the Circuit Court have been in violation of any law, State or Federal, now in force.

And, first, upon the merits—our fundamental proposition is that

I.

THERE IS NO LAW IN EXISTENCE UNDER WHICH A TELEGRAPH COMPANY MAY IN NORTH CAROLINA CONDEMN A RIGHT OF WAY FOR ITS PURPOSES UPON THE STRIP OF LAND CONSTITUTING THE ROADWAY OF A RAILROAD COMPANY.

Discussion on Merits.

Our position will be developed by the following brief analysis of the statute law of North Carolina applicable to the subject under discussion:

Eminent Domain statute of North Carolina, claimed by egraph Company to be applicable to the case at bar, is ınd in chapter 49 of the Code of 1883, which embraces 1932 to 2013, inclusive. The Eminent Domain por- the chapter is actually divided and naturally presents two distinct parts, to-wit: Section 2007 to 2013 inclu- ıbodying the law expressly and originally designed for *companies*—and sections 1943 to, say, 1953 inclusive, ly enacted for the purpose of giving and regulating the o condemn lands to the use of *railroad companies*. Sec- 12 is the connecting link between these two parts or s. Its full text may be found on pp. 15–16, *supra*.

acted appropriately to our present purpose, the section, ıg the heading, may be read as follows:

*proceedings for the condemnation of lands, or any easement st therein, for the use of telegraph companies * * * ıs prescribed in this chapter for condemning lands to the use ads.*"

ıoment the petitioning Telegraph Company in a con- on proceeding starts to follow the chart placed in its y this section, it is met at the threshold by a question emands instant answer, to-wit:

my "proceedings" follow the track of railroad con- on, as prescribed in chapter 49, as it stood in the Code ; or, shall they conform to chapter 49 as it stands to- h all amendments engrafted upon it since 1883?

Telegraph Company, in the case at bar, on the first its first petition, page 3, said: "And by virtue of chap- f the Code of North Carolina of 1883, and *the Acts of ral Assembly of said State amendatory thereof*, desires to ct, maintain and operate a line of telegraph along and e right of way of the Southern Railway Company, *" (italics ours). We take issue with the petitioner osition. Under section 2012 the petitioner has and

had no right in or under any amendment of chapter 49 of the Code.

Principle and precedent unite to establish the soundness of this position. The considerations of reason and common sense in support of it are obvious. The Legislature is presumably familiar with the statute law as it stands at the moment it makes reference to it, and has, presumably, determined upon the applicability of the law, as it stands, to the purpose for which the reference is made and the purpose to which the law is to be applied. It cannot be thus familiar with the law, as it shall stand next year; it will not therefore be presumed to have determined that the law, as it may be amended next year, or any succeeding year, will be applicable and appropriate to the purpose to which it is to be applied to-day.

Endlich on Interpretation of Statutes.

Says "Endlich on the Interpretation of Statutes," pages 113, 114:

SEC. 85. *Meaning of words at Date of Enactment.*—The rule which requires the construction of statutes with reference to their objects and subject-matters, obviously also requires the language of a statute, as of every other writing, to be construed in the sense which it bore at the period when it was passed. * * * Upon the principle stated seems to rest the rule, that an act adopting by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereof."

MEASURE OF COMPENSATION—CHANGE OF POLICY.

Since the enactment of the Code of North Carolina in 1883, not only the mode of procedure "for condemning lands to the use of railroads," but *the policy of the Legislature in determining*

iples which shall govern in ascertaining just compensation erty taken under the right of Eminent Domain, have under-dical changes. We respectfully submit that the Legis-as, by enactment subsequent to the Code, declared in e that the mode of ascertaining just compensation ed by chapter 49 of the Code of North Carolina, shall onger followed; that public policy in this regard has ; that old rules and principles have been swept away; Legislature, for reasons satisfactory to itself, has fallen with a public policy adopted in other States.

change was introduced by the amendment of Section he Code, by subsequent statute;—see Acts of 1891, page

oint involved is practically the most vital and impor-he statute, the point toward which all the balance of moves and tends, to-wit: The estimation of the "com-n" which the land owner shall receive for his property r public use; the determination of the rules and prin-which that "just compensation," guaranteed to the y the supreme law of the land, is to be calculated. aseology of section 1946 (pp. 8 and 10, *supra*), on this ior to the amendment referred to, was as follows:

in determining the amount of such compensation ll not make an allowance or deduction on account of or supposed benefits which the parties in interest ive from the construction of the proposed railroad."

mendment introduced by the law of 1891, consisted in striking out" and repealing the clause above quoted, nserting the following proviso:

ided, however, that in case the benefits to the land, the construction of said railroad, be ascertained to exceed ges to said land, then the said railroad company shall pay of the proceeding and shall not have a judgment for the benefits over the damages."

cally, the sole advantage resulting to the land owner

from this proviso, is the assurance that the condemning company shall not have a judgment against him for the excess of the benefits over the damages. He has, however, lost the protection afforded him by the law as it originally stood in section 1946 of the Code, which, as stated, authorized him to prove the entire amount of his damages, without the same being offset or reduced by any real or supposed benefits estimated to have accrued to his property by the public improvement to be constructed upon it.

As it originally stood in Section 1946 of the Code that clause forbade the commissioners to make "*allowance* or *deduction* on account of any real or supposed benefits which *the parties in interest* may derive from the construction of the proposed railroad."

What is the force of this enactment? Does it not include in its scope and sweep the benefits which *both parties to the proceedings* may derive from the construction of the proposed railroad?—"the parties in interest," both parties, plaintiff and defendant, corporation and citizen, land loser and land getter.

As we understand it, the General Assembly of North Carolina, in originally enacting section 1946 of the Code of 1883, *assumed* that, unless expressly prohibited from so doing, commissioners or appraisers, appointed by the court for that purpose, would ascertain "*just compensation*" to the landowner, by having in view the same considerations which govern a sale of property between private parties; by having in view all and the most valuable uses to which the property may be applied; that is to say, by having "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future," 98 U. S., 403; by having reference to the availability of the property for the uses for which it is wanted by the condemning corporation. In a word, by following the principles announced by this court in the leading case of

98 U. S., 403.

In *Boom Company* v. *Patterson*, 98 U. S. 403, Mr. Justice Field, in delivering the opinion of this court, pp. 407–408, said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in con-

structing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

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90 Va., 425.

In *R. & M. Railroad Co.* v. *Humphreys*, 90 Va., 425, the third instruction of the trial court (p. 436) was as follows:

"3d. The court further instructs the jury that the amount to be awarded Thomas F. Humphreys for his land taken, including the embankment, abutment, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers so taken, at the time of the taking, and said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking."

And the Supreme Court of Appeals of Virginia (at p. 436) said:

"These instructions, and especially the third and last one, given by the court in lieu of those asked for on behalf of the defendant, are so logically adapted to the principles applicable to the peculiar circumstances of the case in hand, that no argument is needed to enforce them. The question presented has been clearly and definitely settled by the highest court in the land, and the doctrine there held has been recognized and enforced by many other courts of very high authority. In *Boom Company* v. *Patterson*, 98 U. S. R., 403, the Supreme Court of the United States has so clearly stated the doctrine as to leave no room for doubt."

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78 Cal., 63.

"In *San Diego Land, etc.* v. *Neale*, 78 California, R. 63, Hayne,

C. (in delivering the opinion at pp. 69–71, adopted by the court, p. 79) said :

" In *Boom Co.* v. *Patterson*, 98 U. S. 403, three islands in the Mississippi river were sought to be condemned for the purpose of a boom or storing-place for floating logs. For general purposes the property was of insignificant value, but it was found to have a large value for boom purposes. It had never been used for such purposes, but there was nothing to prevent other persons or companies from engaging in the enterprise if they had seen fit to do so. It was held that the value for boom purposes must govern. And the court, per Field, J. (who, when on the State bench had concurred in *Gilmer* v. *Lime Point*), said : ' In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such case must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted ?—that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and so varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule ; but as a general thing we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

" The same rule has been laid down in numerous other cases.

In *Harrison* v. *Young*, 9 Ga., 364, 365, a piece of land was sought to be condemned by a bridge company. The trial court refused to admit evidence as to the value of the land 'as a bridge site,' and restricted the evidence 'to the actual value of the land for its agricultural and productive qualities.' It was held that this was an error, the court, per Lumpkin, J., saying: 'Who, in making investments of capital in real estate, is not influenced by the consideration that it will be valuable for a town, bridge, ferry, mill, manufactory, etc.?' In *Louisville R. R. Co.* v. *Ryan*, 64 Miss., 399, the tract condemned was a narrow strip along the Mississippi River. Evidence was admitted to show that it was peculiarly valuable as a mill-site, although no mill was then upon it. Upon appeal, it was held that the evidence was properly admitted, the court saying: 'Clearly, it is of insignificant value for agricultural purposes, and there is neither a wharf, a factory, or a saw-mill on it, and there may never be. But if its adaptability for these purposes, or any one of them, gives it a present value, the owner is entitled to that value, though, in fact, no one now proposes to use it for any of these purposes.'

"In *Chicago R. R. Co.* v. *The Catholic Bishop*, 119 Ill., 530, the property sought to be condemned for railroad purposes was a strip in front of a cemetery. For many years it had been rented as a marble yard. Evidence was introduced that it had a special value for restaurant purposes. It was held that this value should be considered, although the Bishop would not rent it for such purposes, the court saying: 'Because the proprietor of the land elects to use it for one purpose rather than another, we do not think its capacity for the use to which it is not put is improperly taken into consideration in estimating its value.' In *South Park Commissioners* v. *Dunlevy*, 91 Ill., 49, two tracts were sought to be condemned for a public park, and it was held to be proper to prove what the property would be worth if sub-divided into lots and blocks. In *Sherman* v. *St. Paul R. R. Co.*, 30 Minn., 229, the land sought to be condemned for railroad purposes, 'though at the

time occupied as a farm, was situated in the vicinity of the City of St. Paul, and near certain public institutions.' And in view of this, it was held proper to prove its value for suburban residences. And so in other cases. (See *Chicago & E. R. R. Co.* v. *Jacobs*, 110 Ill., 416; *Haslam* v. *Galena R. R.*, 64 Ill., 353; *Little Rock J. R. R.* v. *Woodruff*, 49 Ark., 394; *Railway Co.* v. *McGehee*, 41 Ark., 207; *Amoskeag Co.* v. *Worcester*, 60 N. H., 526; *Low* v. *R. R. Co*, 63. N. H., 558; *Montana R. R.* v. *Warren*, 6 Mont., 275; *Goodlin* v. *Cincinnati Canal Co.*, 18 Ohio St., 181; *Chicago & N. W. R. R.* v. *C. & N. E. R. R.*, 112 Ill., 608; *Matter of N. Y. & L. R. R. Co.*, 27 Hun., 120; *St. Louis R. R.* v. *Chapman*, 38 Kan., 307.)

"We think, therefore, that it was proper to show the value of the property 'as a reservoir site.' This is not sanctioning a remote or speculative value. It is merely taking the present value for prospective purposes."

The policy of the Legislature of North Carolina when it originally enacted section 1946 absolutely prohibited commissioners appointed to assess damages from following the principles announced in *Boom Company* v. *Patterson*, *supra*, and from considering all of the elements there declared to be proper. But the whole policy of the legislature changed when it struck the following words from section 1946, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

When this clause of section 1946 is striken out, what is the inevitable inference? Is it not that the elements declared by this court in the *Boom Case* to be proper (the elements excluded by section 1996 as originally enacted) take their natural place and effect as elements entering into the estimation and calculation of 'just compensation' to the land owner.

If this be a sound view of the law, and we submit that it is, then it seems clear that the railroad company cannot be paid less than what the privilege wanted by the telegraph company is worth to that company—*i. e.* less than the value of a right of way for telegraph purposes on the land of the railroad: that the railroad company cannot be paid less than the value of the benefit which may be estimated to accrue from the railroad company to the condemning telegraph company.

Note how radical is the revolution in policy. Says the law of '83,—when a railroad takes the property of the citizen for its purposes, and the question of just compensation arises, you shall neither reduce the damages by offsetting against them the benefits estimated to accrue to the defendant's property from the construction of the proposed railroad, nor shall you add to them the amount of the benefits estimated to accrue to the condemning company from the same cause. You shall not consider the value of the property with reference to its suitability for the purposes of the condemning corporation. You shall not consider the value of the property with reference to the most advantageous uses to which it may be applied.

But, in the law of '91, the General Assembly has completely changed its mind and its position, and determined that all these elements ought to be, and shall be, considered, and such is the law of North Carolina to-day, as regards compensation to the citizen when a railroad takes his property.

What is the law when a telegraph company condemns?

The learned Judge of the Circuit Court, while admitting that section 1946 had been radically amended and changed as to railroad condemnations, held that it remained in full force as to telegraph condemnations and, in his order of September 15, 1898, prohibited the commissioners from considering the value of the property (sought to be condemned) to the condemning telegraph company, *i. e.* prohibited the commissioners from considering the value of the property with reference

to its location and suitability as a right of way for telegraph purposes.

We respectfully submit that section 1946, as originally enacted, has been repealed and swept out of existence by the deliberate and determined act of the legislature of the State. Notwithstanding this fact, the condeming Telegraph Company takes refuge in the theory of *incorporation* and claims that section 1946 as originally enacted, though repealed and abolished as to railroad companies, still exists as to telegraph companies because of the reference to it in section 2012 of the Code.

We are aware of the existence of such a theory, but it is at best an unnatural theory and entirely without application to the case at bar. Most of the cases in which this theory has been applied will be found to have been characterized by one or more of the following features, to-wit:

(*a*) *The reference to the earlier law* in the referring and preserving statute, has usually been *distinct and elaborate, amounting, indeed, to incorporation and almost to formal re-enactment: e. g.*, in the case of *Regina* v. *Merionetshire*, 6 Ad. & El. N. S. 342 (51 E. C. L.), where it was held that the reference in a statute of 43 G., 3, to a statute of 13 G., 3, preserved the latter from the effect of a general repeal of it by a statute of 5 & 6 W., 4. The case was carried largely by force of the substantially re-enacting character of the reference to the earlier statute, which was in these words: "*as fully and effectually as if the same and every part thereof were herein repeated and re-enacted.*" Notwithstanding the remarkable character of this reference, all the learned judges hesitated, and one of them, Williams, J., on page 347, said:

"It certainly appears strange that, when an act of Parliament is *per se* abolished, it shall virtually have effect through another act. But any difficulty which that may raise is met by the manner in which the earlier act is introduced in Stat. 43, G. 3, c. 59, 'as if the same' 'were herein repeated and re-enacted.' To save the trouble of incorporating it in terms, they

do so by relation: but the provisions are made part of Stat. 43, G. 3, c. 59, 'as much as if they were expressly incorporated.'"

The difference, nay, the contrast, between the phraseology employed in section 2012 of the Code of North Carolina, and the phraseology employed in 43 G. 3, c. 59, is so palpable that further comment is unnecessary.

(*b*) The referring statute is generally a *private, special, or local law*, which, by incorporating some provision of a general law, makes it a part of itself, and thus preserves it, *as a private, special, and local law*, even after it has been repealed as a law of general application and operation. Numerous cases of this character might be cited, but manifestly they could have no application to the case at bar.

(*c*) The theory should never be applied, indeed, it may even be said that it cannot be applied, where both laws are *general in their nature, concern subjects cognate and closely related, and yet are distinctly and strongly contradictory of each other;* because—

(*d*) The matter is largely one of *legislative intent*, and it will not be presumed that the legislature deliberately intended to put or to keep in operation, at the same time, and substantially regulating the same subject, two conflicting and irreconcilable statutes; thus introducing an unreasonable, unjust, and destructive conflict and confusion, in place of that uniform, equitable and reliable system of law which alone can protect, foster, and develop the social and business life of the community.

We said above that section 2012 did not authorize or entitle the Telegraph Company to proceed under the railroad condemnation law as amended since 1883. Is it too much now to add, that it does not authorize or entitle that company to proceed under the provisions of the law of '83 itself, inasmuch as that law has been amended, and, in vital particulars, repealed by the Legislature? Can that body be construed as intending to authorize *a condemning railroad* to apply one measure of compensation and *a condemning telegraph company* a radically

nt one? If we are right in this view, and we hardly v we can be wrong, then we believe we are authorized ating the proposition with which we opened this branch argument, viz:

there is no law existing on the statute book of North na to-day, by which a telegraph company is author- condemn for its purposes the strip of land constitut- roadway of a railroad company.

Effect of Repeal.

above discussion will be rendered more complete, and e more completely satisfactory to the court, by a cita- a few of the many great cases and a few of the many es of great lawyers, jurists and judges, emphasizing tion that a statute repealed is in general to be regarded never had existed.

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14 Eng. L. & E., 127.

Subject: Effect of Repeal of Statute.

gina v. *The Inhabitants of Denton*, 14 Law & Equity, eridge, J., said: "What has been perfected is not to rbed, but if we require the act for any further step it in force at the time. This is expressed by Lord Ten- n *Surtees* v. *Ellison*. He says, 'It has long been estab- hat when an act of Parliament is repealed it must be ed, except as to transactions past and closed, as if it ad existed.' That is the correct rule of law on the and applied to the facts of this case as it was in *Sur- llison*, is quite conclusive here. *The King* v. *M'Kenzie*, R., 429, is to the same effect."

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15 W. Va., 224.

Subject: Effect of Repeal of Statute.

rran v. *Owens*, 15 W. Va., 224, the court, after an ex-

haustive review of English and American cases, said: "We think it well settled, that the general rule is that, when an act of the Legislature is repealed, it must be considered, except as to transactions *past and closed*, as if it never existed."

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46 Ala., 610.

Subject: Effect of Repeal of Statute.

In *Medical College of Alabama* v. *Muldon & Sons*, 46 Ala., 610, the court said: "When a statute is repealed, it must be considered, except as to those transactions which are past and closed, as if it never existed—*Dwarris on Stat.*, 676; *Butler* v. *Palmer*, 1 Hill, 324–328; 9 Wall., 506. Rights of action and other executory rights arising under a statute are said to be vested (*Beadleston* v. *Sprague*, 6 John's R., 101), but unless they amount to a contract, and the statute being simply repealed, *the very stock on which they were grafted is cut down*, and there is no rule of construction under which they can be saved. 1 Hill, 328."

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50 Miss., 681.

Subject: Effect of Repeal of Statute.

In *Musgrove, Auditor, &c.*, v. *V. & N. R. R. Co.*, 50 Miss. 681, the Supreme Court of Mississippi said: "The later authorities, discussing the effect of a repealing statute, generally refer to the terse and precise language of Tindall, C. J., in *Key* v. *Goodwin*, 4 Moore & Payne, 341: 'The effect of the repealing statute is to obliterate the repealed statute as completely from the records of Parliament as if it had never been passed. * * * It must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded* while it was an existing law.' Sustained, as this case is, by so great a weight of authority, we accept it as an accurate statement of the general rule. Some of the very numerous American cases are: *But-*

Palmer, 1 Hill (N. Y.) 324; *Harding* v. *People*, 22 N. Y., *Duane* v. *United States*, 5 Cranch, 281; *C. L. & L. R. R. Co. nton County*, 12 B. Monroe, 144."

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6 Cranch, 329.

Subject: Effect of Repeal of Statute.

The Schooner Rachel v. *The United States*, 6 Cranch, 329, ourt held as follows :

o sentence of condemnation can be affirmed *if the law* which the forfeiture accrued *has expired*, although a con- ation and sale had taken place, and the money had been over to the United States before the expiration of the law. court, reversing the sentence, will not order the money to paid, but will award *restitution* of the property, as if no ad been made."

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5 Wall., 544.

Subject: Effect of Repeal of Statute.

Insurance Company v. *Ritchie*, 5 Wall., 544, Chief-Justice said: "It is clear, that when the jurisdiction of a cause ds upon a statute *the repeal of the statute takes away the ction.* And it is equally clear, that where a jurisdiction, red by statute, is prohibited by a subsequent statute, the ition is, so far, a repeal of the statute conferring the ction.

it quite possible that *this effect* of the Act of 1866 *was ntemplated by Congress.* The jurisdiction given by the 1833 in cases arising under the customs revenue laws taken away or affected by it. In these cases suits may e maintained against collectors by citizens of the same. It is certainly difficult to perceive a reason for discrim- n between such suits and suits under the internal reve- w; but when terms are unambiguo we may not spec-

late on probabilities of intention. The rules of interpretation settled and established in the construction of statutes deny to us jurisdiction of the controversy in the record, because it is a suit between citizens of the same State, and the jurisdiction of such suits in internal revenue cases, conferred by the Acts of 1833 and 1864, is taken away by the Act of 1866."

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7 Wall., 515.

Subject: Effect of Repeal of Statute.

In *ex parte McCardle*, 7 Wall., 515, the court said:

"It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; *and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.*"

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8 Otto., 398 (98 U. S.)

Subject: Effect of Repeal of Statute.

In *Baltimore & Potomac Railroad Co.* v. *Grant*, 8 Otto., 398, the court held that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. In delivering the opinion of the court, Mr. Chief Justice Waite (p. 402), said:

"It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the Act which in express terms indicates any such intention. *Usually where a limited repeal only is intended, it is so expressly declared.* Thus, in the Act of 1875 (18 Stat. at L., 316), raising the jurisdictional amount in cases brought here for review from the Circuit Courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874 (Id. 27), reg-

appeals to this court from the supreme courts of itories, the phrase is, 'That this Act shall not apply now pending in the Supreme Court of the United here the record has already been filed.' *Indeed, so s it, when a limited repeal only is intended, to insert some that express effect in the repealing Act, that if nothing of s found, the presumption is always strong against continuing w in force for any purpose.* We think it will not be that an appeal may now be taken or a writ of error upon a decree or a judgment rendered before the Act ook effect, if the matter in dispute is not more than ut it seems to us there is just as much authority for up new cases under the old law as for hearing old here is nothing in the statute which indicates any in- make a difference between suits begun and those n. If, as is contended, the object of Congress was to jurisdictional amount because of the increase of the orce in the district, we see no good reason why those commenced their proceedings for review of old judg- ould be entitled to more consideration than those who No declaration of any such object on the part of is found in the law; and when, if it had been the in- confine the operation to what was done to judg- reafter rendered or cases not pending, *it would have y to have said so, we must presume that Congress meant ge employed should have its usual and ordinary significa- hat the old law should be unconditionally repealed.*"

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168 U. S., 103.

Subject: Failure to provide for Contingencies.

v. *Goldenberg*, 168 U. S., p. 102–3, Mr. Justice Brewer, for the court, said:

rimary and general rule of statutory construction is that f the lawmaker is to be found in the language that he has is presumed to know the meaning of words and the rules

of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent, *No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.* In the case at bar *the omission* to make specific provision for the time of payment *does not offend the moral sense; Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall., 482; *McKee* v. *United States*, 164 U. S., 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. * * * *Certainly, there is nothing which imperatively requires the court to supply an ommission in the statute, or to hold that Congress must have intended to do that which it has failed to do.*"

In the light of these authorities and the fundamental principles they invoke and impress, we submit that, when the legislature of North Carolina, by the Act of February 25, 1891, struck out a certain clause of section 1946 of the Code of 1883, and *did not accompany or modify this repeal by any limiting or saving clause*, it thereby obliterated and utterly did away, for any and all purposes, with the old measure of compensation to which the land owner had been theretofore entitled when his property was taken from him for public use. In this connection the court will permit us to call special attention to the pregnant utterance of the court upon this precise point, in a case from which a fuller quotation is above made, to-wit: *Balt. & Pot. R. R. Co.* v. *Grant*, 98 U. S., 402.

"Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing Act, that if nothing of the kind is found, the pre-

sumption is always strong against continuing the old law in force for any purpose."

It is manifest how every canon of construction and every consideration of convenience and of common-sense involved in the position above contended for, is heightened and reinforced, in the case at bar, by the fact that both statutes concerned, the old and the new, are general in their nature—not special or local—that both refer to the same general subject matter, and that both regulate the right of eminent domain; so that, to hold otherwise than that the old law has been entirely repealed by the new, must necessarily result in confusion, inequality, and injustice in the administration of one of the most important laws upon the statute book, and in the exercise of the gravest, the most imperial and the most oppressive of all the powers of the modern State.

Position of the Trial Court.

Having thus stated fully our position as to the effect of this repeal, and the principles and authorities upon which it is based, let us somewhat analyze the position of the trial court upon this point. His Honor, the circuit judge who tried the case, held (see his opinion, record, pp. 26 to 33) that the statutory amendments above quoted and discussed *had no effect whatever upon the law regulating condemnation proceedings by telegraph companies*; that, in spite of these amendents, the law of eminent domain applicable to telegraph companies in North Carolina remained just what it was before their passage, being still governed by the sections of the Code of 1883, as they stood prior to amendment.

Observe (1) that section 1946 (p. 8, *supra*) was, by section 2012 (p. 15, *supra*), made applicable to condemnation proceedings by telegraph companies, and (2) that the feature which this section assumes to regulate is the most important and vital point in the entire scope and operation of the law, to-wit: the principle upon which and the rule by which "just compensa-

tion" to the land owner is to be arrived at, when his property is to be taken from him for public use.

Be it further noted that it is distinctly held by the trial court, that this section 1946, as amended, has no application to telegraph companies; so that the sole question remaining to be considered is this:

It being conceded that section 1946, as it stood in the Code of 1883, prior to the passage of the act of February 25, 1891, was thereby repealed, and is no longer in existence as applicable to condemnation proceedings by *railroad* companies—is this old Code section 1946 still in existence and in force as applicable to *telegraph* companies?

His honor rules that it is, and gives as his reason therefor the maxim—"*ut res valeat non pereat*"—which seems to us totally inapplicable as a guiding principle in the construction of a statute of Eminent Domain, where the question is the fundamental one—*whether or not the right exists.* As we understand the law, where this is the question, the court will infer or imply nothing in favor of the right, or of the statute which is claimed to confer it. So far from making any forced construction in favor of the validity of such statute, the correct canon of construction requires that every doubtful point shall be resolved against it. In such a case, upon such a question, in construing such a statute, as has been well said, "to be in doubt is to be resolved," and resolved *against* the validity of the statute and the existence of the right. And yet, so far does his honor, the circuit judge, go, in insisting upon the prevalence of his guiding rule of construction, as he says, "of all written documents," to-wit: "*ut res valeat*"—that, although, as we have just shown, a certain clause of section 1946 has been absolutely repealed by the Legislature, without any saving or limiting clause in the repealing statute, the court, by a single stroke of legislative power, again re-enacts this clause—holding that compensation may be regulated, where telegraph companies condemn, by "adopting *in ipsissimis verbis* the lan-

guage of section 1946, and reading section 2012, as if the words were again repeated." See opinion of the court, record, page 32.

But, his honor goes much further, as we understand his opinion, even suggesting that the court may, if necessary, legislate into existence *a new rule* for estimating compensation (record, p. 32), to the landowner, if it be considered that the words stricken from section 1946, by the Act of February, 1891, have been absolutely and for all purposes repealed. His language is this:

"Or it may be held that the commissioners could assess the damages, as if the qualifying words were out, that is to say, following the instructions of the section immediately preceding the words afterwards stricken out, 'ascertain and determine the compensation which ought justly to be made by the telegraph company to the railroad company.' And, if necessary the court in this respect could direct and instruct them as to a just method." Record, p. 32.

We ask this court to read carefully the language of the opinion of the learned Circuit Judge, and see if we have done him injustice.

A subsequent opinion filed in the cause October 17, 1898, see record pp. 56–58, exhibits the same attitude of the court towards the statute, the same judicial inclination to solve all points of doubt in favor of the validity of the act, which is, if possible, to be sustained. His honor says, record, p. 57:

"The position taken by the defendant is very nice and ingenious. It does not create conviction of its soundness. Yet it is most difficult to answer."

And the closing paragraph of this opinion, p. 58, exhibits yet more impressively the influence upon the judicial mind, of the same guiding rule of construction—"*ut res valeat.*" In the discussion of certain objections of the defendant to the jurisdiction of the Court, the learned Circuit Judge, as a final and conclusive ground for overruling the objections and sustaining the jurisdiction, says:

"If this plaintiff be compelled to go into every county through which the railway company has built its way, and there seek the relief it seeks here, its interest will be put into the hands of very many boards of commissioners, whose conclusions would be naturally conflicting, perhaps contradictory. The enterprise of a telegraph company, now one of the necessities of the commercial world, will be delayed, hampered, perhaps defeated."

This consideration of consequences—the argument *ab inconvenienti*—is thus made conclusive against what is conceded to be the *prima facie* construction of the statute of North Carolina, and this too, notwithstanding the fact that it cannot be denied that the Eminent Domain statute of Virginia plainly requires this very piecemeal jurisdiction of separate county courts, in the condemnation of the strip of land constituting the roadway of a railroad, if indeed such land be subject to condemnation at all.

But again, his honor leaves entirely out of view one of the most important features of the clause which was stricken from Section 1946 (p. 8, *supra*) to-wit: that portion of the clause which relates to the calculation of *benefits to the parties*. He gives reasons, satisfactory to himself, why no possible benefit or advantage could accrue to *the defendant*, from the erection of the telegraph line, and therefore assumes that the feature of Section 1946, as to the "benefits" accruing, falls out of the calculation altogether. In his opinion, record, p. 32, the learned circuit judge says:

"In the present case, looking at it as a practical matter, no difficulty could arise. The Railroad Company deny altogether that any benefit or advantage can arise to it in the erection of the telegraph lines, and on the contrary aver that it is detrimental to it in the last degree. The commissioners would have before them no question of benefits, but one altogether as to damages."

His honor evidently overlooked the principles announced in *Boom Company* v. *Patterson*, *supra*, and that established line of cases, as well as the fact that the clause (p. 13 *supra*) which was stricken from section 1946 of the Code by the act of 1891, speaks both of "allowance" and "deduction" of "benefits"

accruing to "*the parties*"; *i. e.*, of course, to both parties. We do not see how it is possible for the clause in question to be otherwise construed, and if we are correct in this position, the opinion of the court is incorrect, in inferring that, "in the present case, looking at it as a practical matter, no difficulty can arise."

The point just made is merely another indication that the construction of the statute by the trial court was not sound, and ought to be reviewed and reversed by this honorable court.

As heretofore stated, it will be seen from the opinion of the Circuit Court record, pp. 26–33, and the orders of September 15, 1898, and October 24, 1898, copied at pp. 16, 17 of this brief, that the learned Circuit Judge substantially ruled that condemnation proceedings by railroad companies are governed by the amendment of February 25, 1891, while condemnation proceedings by telegraph companies are governed by section 1946, as it stood in the Code of 1883, prior to amendment.

In the light of this ruling let us see what the practical result would be, in a given case, of the successive operation of the two Eminent Domain statutes, both of which are thus construed by the trial court to be in existence and operative today.

Let us suppose, for example, that a railroad company in North Carolina, having first condemned the property of a citizen for its purposes, is about to have the same property—now become the property of the railroad—condemned by a telegraph company for its purposes. Let us further suppose that the value of the property of the land owner in each condemnation, having reference to the uses to which the property was then applied and having no reference to the uses to which it was plainly suitable, amounted to, say, $1,000, and that the value of the property for other uses to which it was naturally suitable and for which it was wanted by the condemning company, to-wit: the railroad company in the first condemna-

tion and the telegraph company in the second, amounted to, say, $10,000. Is it not clear that, in the first condemnation, governed by the law of 1891, the railroad company would be required to pay the citizen, whose property it took, the sum of ten thousand dollars ($10,000); while in the second condemnation governed by Code section 1946, the telegraph company would only be required to pay the railroad company the sum of one thousand dollars ($1,000)? Will it be contended that such a result represents and embodies "the equal protection of the laws"

The order of September 15, 1898, (p. 16 *supra*) prohibits the commissioners from considering the benefit to be derived by the telegraph company or the value of the condemned property to it: that is to say, this order shuts out light with reference to the suitability of the property for the purposes for which it is wanted; it shuts out the inquiry—"What is the value of the property for the most advantageous uses to which it may be applied?" 98 U. S., 410:—the language of the order in this point being as follows:

"The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Co. or the value thereof, to it;" see record, p. 36.

The Eminent Domain Legislation of North Carolina, in relation to the Fourteenth Amendment to the Constitution of the United States.

We have thus far discussed the question as to what the eminent domain legislation of North Carolina really is to-day, and this discussion has proceeded largely upon the basis of what

ight be considered to be the intention of the Legislature in
e premises. In other words—whether or not section 1946, of
e Code of North Carolina of 1883, is to be regarded as in
xistence and in force, under a proper construction of the
mendatory and repealing statute, adopted the 25th of Feb-
ary, 1891; whether or not the reasonable construction of
id section and said amendatory and repealing statute, will re-
lt in both the statutes remaining upon the statute book and
force to-day, the one applicable to railroad companies, and
e other applicable to telegraph companies.

We now lay down another and totally distinct proposition,
-wit: that, whatever may have been the intention of the leg-
lature of North Carolina in the premises, and whatever its
gislation upon this subject, under the soundest and truest
nstruction, may be held to be to-day, yet, *that legislation would
cessarily be invalid, under the Fourteenth Amendment to the Con-
itution of the United States, if it really is what it was construed
be by the learned judge of the Circuit Court.* In other words, the
ecision of that court, substantially holding that proceedings
a telegraph company, to condemn a right of way for its
rposes in the State of North Carolina, are governed by and
be conducted in accordance with section 1946 of the Code
1883,—and that proceedings by a railroad company, to con-
mn a right of way for its purposes in said State, are gov-
ned by and to be conducted in accordance with said statute
amended by the Act of February 25, 1891,—the two statutes
idely differing in the rule and measure of compensation
hich they apply—is in violation of section 1, Article XIV of
Amendments to the Constitution of the United States," which
ovides as follows:

**"Nor shall any State deprive any person of life, liberty
property without due process of law; nor deny to any
rson within its jurisdiction the equal protection of the
ws."**

The application and the conclusive effect upon the question

under discussion, of the provisions above quoted, can be questioned, as it seems to us, only upon one of *three grounds*, which we will consider seriatim: but we prefer to conduct the discussion and to state our position under three positive, rather than three interrogatory or negative, propositions; and

FIRST.

A corporation is a "person" within the meaning and purview of the Fourteenth Amendment to the Constitution of the United States.

165, U. S., 150.

Subject: Corporation a person under XIV Amendment.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, Mr. Justice Brewer, in delivering the opinion of the court (pp. 154–56), said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S., 394; *Pembina Mining Co.*, v. *Pennsylvania*, 125 U. S., 181, 189; *Missouri Pacific Railway* v. *Mackey*, 127 U. S., 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S., 210; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S., 26; *Charlotte & Columbia Railroad* v. *Gibbes*, 142 U. S., 386; *Covington & Lexington Turnpike Company* v. *Sanford*, 164 U. S., 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

SECOND.

The defendant corporation is to-day, and was at the date of the beginning of this proceeding, a "person *within its jurisdiction*," and therefore entitled, under the 14th Amendment to the

onstitution of the United States, to claim "the equal pro-ction of the laws" of the State of North Carolina.

It is scarcely worth while to support this proposition by au-ority, it being sufficient to say that it has been held by this urt that the words "within its jurisdiction" are not without eaning and influence upon the proper construction of the ction of the Fourteenth Amendment under discussion, *i. e.*, e position of the court is that—whatever may be said as to due process of law," a person to be entitled to "the equal otection of the laws," must be *within the jurisdiction of the ate*, whose laws are questioned in this regard. It is clear, wever, that a corporation owning property and doing busi-ss within the confines of a State—in other words, a corpora-n in such relation to a State as is and was the appellant ilway Company with regard to the State of North Carolina cannot be denied to be, within the meaning of the first sec-n of the Fourteenth Amendment, "*within the jurisdiction*" of ch State.

THIRD.

The third proposition which we intended to lay down, natu-ly divides itself into two, and this because of the fact that are here really invoking for the defendant company, *i. e.*, the aintiff in error, the protection of two distinct and independent ovisions of the Fourteenth Amendment to the Constitution the United States, to-wit: the provision which entitles every rson to "due process of law," and the provision which en-les every person to "the equal protection of the laws." king the last provision first, we now declare:

The eminent domain legislation of North Carolina, as con-ued by the honorable Circuit Court in the decisions and lers brought before this court for review, denied to the de-dant Railway Company "the equal protection of the laws" that State.

165 U. S., 154.

Subject: Equal Protection of the Laws.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 154–156, Mr. Justice Brewer said: "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes* v. *Missouri*, 120 U. S., 68; *Railroad Company* v. *Mackey*, 127 U. S., 205; *Walston* v. *Nevin*, 128 U. S., 578; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232; *Pacific Express Co.* v. *Seibert*, 142 U. S., 339; *Giozza* v. *Tiernan*, 148 U. S., 657; *Columbia Southern Railway* v. *Wright*, 151 U. S., 470; *Marchant* v. *Pennsylvania Railroad*, 153 U. S., 380; *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S., 1; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

"As well said by Black, J., in *State* v. *Loomis*, 115 Missouri 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder, at the store or other place of business of the corporation, was held

gislation and void: 'Classification for legislative pur-
nust have some reasonable basis upon which to stand.
t be evident that differences which would serve for a
ation for some purposes furnish no reason whatever
lassification for legislative purposes. The differences
will support class legislation must be such as in the
of thing furnish a reasonable basis for separate laws
gulations. Thus the legislature may fix the age at
persons shall be deemed competent to contract for
lves, but no one will claim that competency to contract
made to depend upon stature or color of the hair. Such
fication for such a purpose would be arbitrary and a
legislative despotism, and therefore not the law of the

Vanzant v. *Waddel*, 2 Yerger, 260, 270, Catron, J., (after-
Ir. Justice Catron of this Court,) speaking for the Su-
Court of Tennessee, declared: 'every partial or private
ich directly proposes to destroy or affect individual
or does the same thing by affording remedies leading
ar consequences, is unconstitutional and void. Were
erwise, odious individuals and corporate bodies would
rned by one rule, and the mass of the community, who
e law, by another.'

Dibrell v. *Morris' Heirs*, Supreme Court of Tennesse, 15
Lep., 87, 95, Baxter, special judge, reviewing at some
cases of classification, closes the review with these
'We conclude, upon a review of the cases referred to
hat, whether a statute be public or private, general or
in form, if it attempts to create distinctions and classi-
between the citizens of this State, the basis of such
ation must be natural and not arbitrary.'

Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, the
was presented as to the power of the State to classify
oses of taxation, and while it was conceded that a large
n in these respects was vested in the various legisla-
e fact of a limit to such discretion was recognized, the
y Mr. Justice Bradley, saying, on page 237: 'All such

egulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition!'"

148 U. S., 312.

Subject: Eminent Domain: Equal protection under XIV Amendment.

In the case of *Monongahela Navigation Company* v. *United States*, 148 U. S., 312, Mr. Justice Brewer, after citing, on page 324, *Simmickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, and considering that part of the Fifth Amendment to the Constitution of the United States which prohibits the Federal Government from taking private property without compensation, at p. 327, said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 571, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country

d constitutionally do: assess the amount of compen-
which the complainants are entitled.' See also the
authorities: *Commonwealth* v. *Pittsburg & Connells-*
oad, 58 Penn. St., 26, 50; *Penn Railroad* v. *Balt. &*
road, 60 Maryland, 263; *Isom* v. *Mississippi Central*
36 Mississippi, 300.

e last of these cases, and on page 315, will be found
ervations of the court: 'The right of the legislature
te, by law, to apply the property of the citizen to the
, and then to constitute itself the judge in its own
etermine what is the 'just compensation' it ought to
for, or how much benefit it has conferred upon the
thus taking his property without his consent, or to
any part of such 'compensation' by prospective
l advantage, or *in any manner* to interfere with the
rs and province of courts and juries in administering
justice, cannot for a moment be admitted or tolerated
constitution. If anything can be clear and unde-
on principles of natural justice or constitutional law,
hat this must be so.'

re not, therefore, concluded by the declaration in the
e franchise to collect tolls is not to be considered in
the sum to be paid for the property."

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rned Circuit Judge seems to have overlooked these
and the feature of the statute and of the statutory
roduced by the amendment of 1891, upon which we
mented, and the unequal operation of the statutes
have discussed.

submit, inconceivable that valuations so radically
in condemnations by telegraph companies as con-
h condemnations by railroad companies in circum-
substantially similar, should represent the "equal
of the laws," guaranteed by the Fourteenth Amend-
e Constitution of the United States, or embody that
pensation" guaranteed to the citizen when his pro-

perty is taken by the exercise of the sovereign power of Eminent Domain.

Due Process of Law.

The Eminent Domain legislation of North Carolina, as construed and administered in the case at bar, under the decisions and orders of the trial court brought here for review, deprived the defendant of that "due process of law," to which he was and is entitled, for the protection of his property, under the Fourteenth Amendment to the Federal Constitution.

It is unnecessary to enter upon an extended discussion of this point. The discussion contained in a later part of this brief, with regard to the "Mode of Procedure" as fixed in the orders of the Circuit Court, bears directly upon the proposition just laid down. If the statute of North Carolina, properly construed, authorizes and allows that all the important *judicial* acts, which are required to be performed in the course of a proceeding for the condemnation of property, should be performed by the clerk of this court,—then it is manifest that this statute authorizes the taking of the property of the citizen without "due process of law."

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169 U. S., 390.

Subject: Due process of law under XIV Amendment.

In *Holden* v. *Hardy*, 169 U. S., 366, Mr. Justice Brown in delivering the opinion of the court, at p. 390, said:

". . . Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence."

CHARACTER OF PROPOSED CONDEMNATION.

The Circuit Court by its orders of Sept. 15, 1898 and Oct. 24, 1898:

3. Determined that the condemned right of way for telegraph purposes may be unfixed, shifting and changing as to location. (P. 19 *supra*).

We call attention to the character of the proposed condemnation. The plaintiff telegraph company proposes to condemn an unfixed, changing right of way. It proposes to so condemn the telegraphic right of way, that it may be shifted and changed from time to time. It is impossible to know or to determine where the rights of the telegraph company begin, and where they end; to designate any particular spot upon the land of the railroad where the line of the telegraph company is to be located, and when located to remain. It may be on one side of the track this month, on the other side next month, and in yet another place a few months later. In short, the inevitable inferences is, if this mongrel condemnation is to be allowed—that the telegraph company shall be held to have condemned the entire roadway of the railroad for its purposes —and yet this is not what is ostensibly prayed in the telegraph company's petition.

On the contrary, the condemnation proposed by the telegraph company appears to be part condemnation and part *enforced agreement*. It takes the whole sovereign power of a State to condemn the property of a citizen under the law of North Carolina, but under the petition of the telegraph company, in the case at bar, it can condemn a right of way and afterwards swap that right of way for another and different right of way. It may be likened to the condemnation of an acre-lot in a field, accompanied with a proposition to the defendant that, if he wants that particular acre, the condemning corporation will at any time hereafter swap it for another acre in a different part of the field. In view of the rules governing condemnation, this strikes the mind as a remarkable proposition.

By reference to the petitions filed June 22, 1898, by the telegraph company, it will be seen that the right of way for telegraph purposes sought to be condemned upon the land of the Railway Company is unfixed, and shifting; that the petition contains no definite description of its location; that no map or survey accompanied the petition; and that the petition contains no statement that a map or survey has been made or filed anywhere, or served on the Railway Company.

The requirement of section 1944, of the Code of North Carolina, (pp. 6–7, *supra*,) that a corporation seeking to condemn shall state in a petition duly verified, "*that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed;*" seems to require that a telegraph company seeking to condemn a right of way upon the property of a railway company, shall state clearly and accurately the metes, bounds and width of the right of way wanted by the telegraph company for its purposes. This provision of section 1944 seems to prohibit the condemnation of an unfixed, shifting and changing right of way for telegraph purposes.

The public policy of the General Assembly at the time of the enactment of the Code of North Carolina, required a corporation seeking to exercise the sovereign right of Eminent Domain, to declare with clearness and precision exactly what it sought to take from the land-owner against his will and in derogation of common right, and by a map to show just where the right of way wanted for telegraph purposes is to be located on the land sought to be condemned. This will be clearly seen by a perusal of sections 1944 and 1952, copied in full at pp, 6–7, and pp. 10–11, of this brief.

106 N. C. 16.

In *Railroad* v. *Railroad*, 106 N. C., p. 16., the second paragraph of the syllabus is as follows:

"2. The petitioner in a proceeding to condemn land must allege that it has 'surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that it has located its said road according to such survey, and filed certificates of such localities, signed by a majority of its directors, in the Clerk's office,' &c., as required by the Code, Section 1952; otherwise, the proceeding will be dismissed."

And at p. 23 the Supreme Court of North Carolina said:

"This introduces us to the other ground assigned by the defendant, that the petitioner does not allege that it has 'surveyed the line or route of its proposed road, made a map or survey thereof by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such localities, signed by a majority of the directors of the company, in the Clerk's office, and given notice,' &c. The Code Section 1952.

"These conditions must be complied with before any company can construct any part of its road, and the Code Section 1944 requires that their performance shall be alleged in the petition in all proceedings to condemn land." * *

* * * * * * * *

And on page 25 the court further said:

"The foregoing references are made for the purpose of showing the true spirit and purpose of these laws, and that the performance of the preliminaries required is indispensably necessary before proceedings to condemn can be instituted. It is said that, although the petition in this case fails to allege the performance of these conditions, the omission is not fatal, that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such powers must be strictly construed. By the very terms of the law under consideration, these allegations must be

made in the petition, and we think that they are as much jurisdictional in their character as is the fact that the land owner and the Railroad Company have failed to agree. 'If the petition does not state the facts required by the statute to be stated an objection in that regard can be raised preliminarily in effect by way of demurrer, and should be disposed of before proceeding upon the merits. If such objection is well taken, the proceeding is dismissed, unless proper cause for amendment is shown.' West Shore & Buffalo Railroad Co., 64 How. Prac. 216; Fieri Special Pro, 523. So far from any amendment being suggested in the particulars mentioned the counsel were candid enough to admit that maps of the route, &c., had not in fact been filed."

It seems clear, in the light of this decision, that appellee's entire proceeding to condemn should be dismissed with costs.

The public policy of North Carolina has at least not been weakened in this particular since 1883, as may be seen by Acts of 1893, page 392 (pp. 12–13 *supra*), where it is required of a railroad seeking to condemn land for its purposes, "that, *at the time that the summons for such condemnation is served*, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land so sought to be condemned, and at what points on such lands such cuts and embankments are located."

The petition of the Telegraph Company is in the very teeth of the public policy of the State of North Carolinia, outlined in the above enactments. The public policy of North Carolina requires clearness, accuracy and certainty—metes, bounds and locations, where a corporation seeks to exercise the sovereign right of Eminent Domain. The proceeding of the Telegraph Company in this case violates both the letter and the spirit, the purpose and the intent of the statutes enacted for the protection of the property owner. No map was served upon the Rail-

ad Company with the petition of the Telegraph Company; survey of its proposed route has been made by the Telegraph Company; no map by which such route is designated s been made; no location of such route has been made; no rtificates of location have been signed by a majority of the rectors of the Telegraph Company and filed in the clerk's fice of the counties through which it is proposed to extend ch route. In a word, the right of way for telegraph purses sought to be condemned by the Telegraph Company on the land of the Railroad Company is an indefinite, uncerin, changing, right of way, never at any time contemplated the General Assembly, and the proceeding wholly violates at clearness, accuracy, and certainty as to metes, bounds, cation, uses and the like, contemplated in chapter 49, of the de of North Carolina.

The public policy of the State, in requiring surveys, maps, rving of map with summons, designation of proposed route, cation according to survey, filing of certificates of location gned by a majority of the directors of the company in the erk's office, and the like, applies with infinitely greater, ined, with overwhelming force, to a case in which an attempt made to condemn a right of way for telegraph purposes up- the narrow and valuable strip of land of a railroad; upon artery of commerce; upon land used as a means of comunication between one part of the country and another; on a narrow strip of land along and upon which great numrs of passengers are daily and hourly transported at a emendous and ever-increasing rate of speed, and as to whose fety the law requires the railroad company to exercise every ssible degree of care and diligence, both as to its trains and rs, and as to the structure, repair, and care of its track, and other arrangements necessary to the safety of passengers.

Public policy and public safety alike require that a railroad mpany shall exercise all possible care and diligence for the otection of the lives of its passengers.

A map or survey showing the proposed route and designating e location of the telegraph line, would give the Railroad

Company an opportunity to show that the right of way wanted by the Telegraph Company for its purposes, would be inconsistent with the efficient management of the railroad; that the lives, limbs and safety of its passengers would be endangered by the presence of this hostile telegraph line, *with a right of way upon its* strip of land; and that the concurrent occupancy of its property, as proposed by the Telegraph Company, *would obstruct the ordinary use of the railroad.*

The right of way for erecting, repairing and preserving the poles, wires, and other structures necessary for operating a telegraph line, necessarily requires the possession of and control over a definite space of ground.

This space must be sufficiently broad to enable the telegraph company to transport poles and other materials by wagons, or suitable vehicles, along and upon the right of way so condemned, and to permit gangs of hands to erect new poles and other structures, to repair and replace defective, decayed, leaning or fallen poles and generally to keep the line in good condition."

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25 Vermont, 150.

Subject: Railroad's Exclusive Occupancy of its Right of Way.

In the case of *Jackson* v. *Rutland & B. R. Co.*, 25 Vermont, 150 Redfield, Ch. J., in delivering the unanimous opinion of the court, p. 159, says: * * "The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the *exclusive occupancy of the land taken, and to exclude all concurrent occupancy*, by the former owners, in any mode and for any purpose. Any other view of the subject must lead to the imminent peril of life and property, and ultimately to the most glaring absurdities." * *

NO RIGHT TO CONDEMN IN ONE PROCEEDING.

The Circuit Court by its orders of September 15, 1898, and October 24, 1898:

4. Determined that the entire condemnation may be ad in one proceeding upon a strip of land, much of hich is held in fee simple (by the Railway Company) elonging to a single owner, and extending through twelve ifferent counties, a distance of nearly two hundred and fty miles.

The Telegraph Company seeks in one proceeding, instituted the Superior Court of Guilford county, to condemn, for its rposes as a telegraph company, a continuous right of way ong, upon and over the lands of the Southern Railway Comany, from a point on the State line between the States of orth Carolina and Virginia, where the Southern Railway osses the State line; thence south through the counties of ockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, nd Mecklenburg to the town of Charlotte, in the last-named unty, and from the town of Greensboro, in the county of uilford, to the city of Raleigh, passing through the counties Guilford, Alamance, Orange, Durham, and Wake, and from reensboro to Winston in Forsyth county, a distance of early two hundred and fifty miles. This mode of procedure probably based upon a misconception of section 2010 of e Code of North Carolina, the full text of which has been ven at pp. 14-15, of this brief.

What is required by this section, where an effort is made condemn a right of way for telegraph purposes on land eld in fee simple.

SECTION 2010 ABSTRACTED AND APPLIED TO LANDS HELD IN FEE SIMPLE.

" Whenever such telegraph company shall fail, on application there-r, to secure by contract or agreement such right of way for the pur-ses aforesaid over the lands, * * of another person or corporation, shall be lawful for such telegraph company, first giving security for sts, to file its petition before the superior court for the county in which id lands are situate, * * setting forth and describing the parcels land, * * over which the way, privilege or right of use is claimed,

the owners of the land, * * and their place of residence, if known, and if not known, that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, * * Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings. * * * "

We respectfully submit that section 2010 thus analyzed and extracted fully answers the question propounded. It seems to be plain that proceedings to condemn a right of way for telegraph purposes on lands held in fee simple by a "person or corporation," must be in each particular county where the land, upon which the telegraphic right of way is wanted—is situated. Stated in other words; if the telegraph company has a right to condemn a right of way for telegraph purposes on lands held in fee simple by the Southern Railway Company, situate in Randolph county, the proceeding to condemn must be instituted and conducted in the Superior Court of Randolph county. It cannot be instituted and conducted in the Superior Court of Guilford county. This statute confers no power upon the Superior Court of one county to condemn a right of way for telegraph purposes on lands held in fee simple by a person or corporation situated in another and different county. No other statute of North Carolina confers jurisdiction upon the Superior Court of Guilford county to condemn a right of way for telegraph purposes, upon lands held in fee simple by a person or corporation which are situated in a county other than Guilford.

A large part of the land of the Railway Company, over and upon which the Telegraph Company seeks to condemn a right of way for its purposes, is held by the Railway Company in fee simple. These lands were acquired by purchase from the original owners, under deeds conveying to the Railway Company the fee simple title to the lands. The title of the Railway Company to such lands is as complete and absolute as the title of any citizen who has purchased property and taken a deed conveying to him a title in fee simple.

erified answer of the Railway Company, record p. 48, h 3, states, "that a large portion of the lands of this t along and upon which the petitioning Telegraph y seeks to condemn the right of way for its purposes in us counties specified in its said petition, is held by ndant in fee simple—the said land having been ac- y purchase from the original owners under deeds con- this defendant fee simple title to the same, a title as and absolute as that of any citizen who has purchased taken a deed for the same in fee simple." This an- met by demurrer, not denial. It has never been de- on this basis, on this point, the Circuit Court entered of September 15, 1898, and October 24, 1898.

2010 does not provide one mode of condemnation raph purposes when land is held in fee simple by a " and a different mode when land is held in fee a "corporation" The person stands on the same ith the corporation. The statute in this regard ap- e to the Railway Company and the citizen.

thority, under section 2010, to condemn in one pro- hrough more counties than one is *absolutely confined* where a telegraph company seeks to condemn a right r its purposes "over or upon an *easement or right of* h extends into or through more counties than one."

ord "land" is repeatedly used in Section 2010. The be said of the words "easement, or privilege," and "right of way." Technical words or terms are em- They are used in a statute presumably sketched by selected for their general and technical knowledge of sprudence, and adopted by the Legislature presumably mination by a special committee composed of the lead- rs in that body, and upon full consideration by revis- mittee, and the legislative body. When technical terms are used by a legislative body, the courts will the statute containing such words or terms, according echnical meaning. "The primary and general rule

of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." 168 U. S., 102.

Section 2010 contains no warrant for condemning the lands of a railroad company held by fee simple titles and extending through many counties in one proceeding. No proceeding like the one at bar can be taken, except where a telegraph company seeks to condemn a right of way "over or upon an easement or right of way which extends into or through more counties than one." The words "easement or right of way" do not embrace or include lands held by a fee simple title.

If the Legislature had intended that a right of way for telegraph purposes might be condemned in one proceeding upon land held in fee simple extending through many counties as well as upon a privilege or easement or right of way over land extending through more counties than one, it would have said so. It did not provide for such jurisdiction in a single county where a right of way is sought to be condemned upon land, extending through several counties, held under deeds conveying fee simple titles; and we respectfully submit that it would violate legal principles to so hold.

In the light of these authorities and the rule and principle to be deduced from them, it would seem clear that section 2010 of the Code of North Carolina does not authorize the condemnation by a telegraph company, of a telegraphic right of way over the property of a railway company extending into or through several counties—in one proceeding, to be brought in the superior court of any one of such counties—unless where the property, over which such telegraphic right of way is proposed to be condemned, is itself *a right of way only* as contradistinguished from land held by a fee simple title. It will be observed that the section clearly contemplates two distinct cases of condemnation by a telegraph company, and that the distinction between these two cases does not lie in the

ter of the right, title, or interest, which the petitioning
ph company is to obtain by the proceeding. No—that
ays and in every instance a *mere* right of way. Nor does
tion recognize any distinction or authorize any different
of procedure in condemning the property of private in-
als and of corporations; but it does recognize such dis-
n, between cases where a telegraph company proposes
demn for its purposes a right of way over lands held in
ple, and cases where it proposes to condemn for itself
ght of way over a mere easement or right of way, and
authorize different forums and different modes of pro-
in these two different classes of cases. Under the au-
s cited and the rule of construction therein laid down,
mit that it is not permissible to enter the forum or to
he procedure in one class of cases, which the statute
applicable in another class.

TION OF CIRCUIT COURT ON DEMURRER.
REFUSAL TO HEAR TESTIMONY.
CONDITIONS PRECEDENT.

Circuit Court by its orders of Sept. 15, 1898, and Oct.
8:

etermined upon demurrer that every defense set up
answer of the railway company is without merit,
hough it were proved by conclusive evidence.

efused to hear proof as required by section 1945 of the
f North Carolina.

etermined without proof conditions precedent to con-
tion under the North Carolina statutes.

event can a telegraphic right of way be condemned on
ad unless it be shown that the proposed telegraph line
so constructed "as not to obstruct or hinder the usual
n such railroad," &c., s. 2007. The condemning cor-
must file its petition. The railroad upon which the

ght of way is sought to be condemned then files its answer. he issue is thus made up. This section requires the court to ear the proofs, and if no sufficient cause be shown against e condemnation, to appoint commissioners. Observe, how- rer, that the court itself must hear the proofs upon which sue is joined *before* the appointment of commissioners. The ourt itself must determine that the right to condemn *exists.* he court itself must determine that the proposed telegraph ne will not obstruct ordinary travel nor hinder the usual avel on such railroad. In order to know whether or not the ne will do this, the court must know the character and loca- on of the line. These questions are, therefore, *jurisdictional.*

The sections of the Code of North Carolina specially bearing pon this point are as follows:

Sec. 2007. Telegraph lines, who may maintain. 1874-'5, . 203, s. 2.

Any telegraph company chartered or incorporated by this r any other state shall have the right to construct, maintain nd operate lines of telegraph along any railroad or other ublic highway in the State of North Carolina, but such lines f telegraph shall be so constructed and maintained as not to bstruct or hinder th usual travel on such railroad or other ighway.

Sec. 2009. Entitled to right of way upon just compensation. 874-'5, c. 203, s. 4.

Such telegraph company shall be entitled to the right of way ver the lands, privileges and easements of other persons and orporations, and the right to erect poles and establish offices, pon making just compensation therefor.

Section 1945 of said Code is the only statute which has at ny time provided for the appointment of commissioners, and hat statute requires *conditions precedent* to such appointment: t provides that all persons, whose estates or interests are to be ffected, may answer and show cause against the condemna-

uires the court to hear the proofs and allegations of , in any and every event *before* appointing commis-

text of section 1945 is as follows:

Section 1945.

5. "*Allegations made against petition; Freeholders appraise estate.* 1871–2, c. 138, s. 15.
esenting such petition to the Superior Court as with proof of service of a copy thereof, and notice l, all or any of the persons whose estates or interests ffected by the proceedings, may answer such petition ause against granting the prayer of the same, and ve any of the facts alleged in it. The court shall ofs and allegations of the parties, and if no sufficient own against granting the prayer of the petition, it an order for the appointment of three disinterested tent freeholders who reside in the county where the e to be appraised, for the purposes of the company, x the time and place for the first meeting of the ers."

er of the Railway Company (record pp. 41 to 54), te defense, measured up to every requirement of mentioned statutes. It (amongst other defenses) varied form, that the roadway of the railroad et wide; it declared in substance that this road- many places very much less than 100 feet broad; too narrow to make it physically possible to con- graph line thereupon in such manner as not to in- ordinary travel. It declared, in effect, that the ed to be constructed by the Telegraph Company sly imperil the running of trains and grossly ob- rdinary use of the railroad. See record, pp, 50–51, 11.

EXTRACT FROM ANSWER OF RAILWAY CO

"11. Further answering, defendant denies 'that the right of way' of this defendant is 'about 100 feet wide, and it extends about 50 feet from a line along the centre between the rails of said main track;' on the contrary, defendant states that the strip of land along which its tracks are laid and its trains are run varies greatly in width at different points along its line, and that at sundry points along said line included in and covered by the condemnation proceedings of the plaintiff is much less than 100 feet in width, indeed, is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon." See record, pp. 50-51.

The Telegraph Company *demurred* to this answer and the court *sustained the demurrer*. When the court sustained the demurrer, it declared in substance that the answer was without merit; that even though the Railway Company might prove all the averments of the answer, by legal and conclusive evidence, yet the Telegraph Company would be entitled to the relief prayed; that the Telegraph Company had the right to condemn a right of way upon the land of the Railway Company.

Notwithstanding the action of the Circuit Court upon the demurrer the Railway Company asked leave to introduce testimony sustaining the averments of its answer, (appearing in the record at pp. 41 to 54) and the court refused to permit the introduction of the testimony—the language of its order of Oct. 24, 1898 (record pp. 58–59) on this point being "and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court." See also "Defendants Bill of Exceptions No. 3" record, p. 62.

In a word, the court determined that the Telegraph Company has and had the lawful right to construct its lines upon appellant's railroad, notwithstanding the distinct and definite admission of the Telegraph Company, by its demurrer to defendant's answer, that, as a matter of fact, the strip of land constituting the roadway of the Railroad Company—"is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon." (See record top of p. 51.)

Of course, after sustaining the demurrer to appellant's answer, the court acted logically in refusing to allow appellant "to introduce testimony sustaining the averments of its answer." When the court, upon demurrer, determined that there was no merit in any of the defenses set up in the answer, it probably considered it idle to allow the introduction of testimony establishing facts which the Telegraph Company admitted to be true, and which the court considered insufficient to defeat the rights claimed by the Telegraph Company. But, in adopting this view, *the court closed and ended the case, upon every question raised by the petition and answer*—save and except *the amount of compensation*, which was limited and restricted as hereinbefore set out, and the Railway Company was practically debarred from further defending itself, upon any other ground or question. The Railway, however, was advised, and is to-day advised, that the time had not arrived for battle upon the question of compensation, and would not legally arrive, until the court should first permit it to introduce proofs upon the *precedent* and *jurisdictional* questions raised in its answer, and should pass upon these proofs adversely, holding that they did not sustain and establish these vital defenses.

In every aspect, legal and practical, the questions raised in its answer are vital questions to the appellant. Not only do they concern and determine the existence or non-existence of the right of the Telegraph Company to condemn the property of the railroad, but upon their solution depends appellant's

" exclusive " possession and control of its own roadway so essential to the efficient discharge of its great public duties and obligations.

But appellant is further advised and submits, that the Statutes of North Carolina do not contemplate or provide for any compensation whatever being awarded, under the conditions set forth in its sworn answer; that these statutes do not contemplate or intend that any sum of money, however great, awarded and paid in damages, can authorize the petitioning Telegraph Company to construct and maintain its lines upon the strip of land constituting the roadway of appellant, or properly compensate appellant therefor—if such construction will obstruct or hinder the usual travel on such railroad, or imperil its safe operation, as it is clearly set forth in appellant's answer such construction and maintenance will do.

In the case at bar, not only did the defendant below deny the existence of any statute under which the condemnation of its property for the purposes of the plaintiff could be lawfully conducted and effectuated, but it also averred and offered to prove that its strip of land was of such a character that the telegraph line of the plaintiff could not be so constructed and maintained as not to obstruct or hinder the usual travel on its railroad; nay offered to prove much more than this, to-wit: that its strip of land was so narrow that, to erect a telegraph line thereupon, in the manner set out in said petition, would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad—that is, would grossly imperil the lives of the citizens of the State and of the country at large, travelling upon defendant's railroad trains; and all this might happen without the entry of any further order by the court, which had turned the matter over to its clerk to appoint the commissioners and superintend their sessions; the statute, section 1946 of the Code, authorizing the plaintiff company to take possession of the defendant's property and to construct, maintain and operate its line thereupon, upon payment into court of the sum appraised by the commissioners, upon the filing of their report in the clerk's office.

Just here we submit three questions, to-wit:

(1) Is the issue thus raised and the defense thus interposed in the answer a substantial issue and a valid defense, or not?

(2) Had the defendant, at the time it filed its answer, or will it ever have, the right and opportunity to raise this question and to interpose this defense?

(3) If so, when and where?

Could the defendant, though well aware of the existence of a state of facts which must eventually defeat and render nugatory the entire expensive and vexatious proceeding before commissioners, yet remain silent and allow the court to appoint them and allow them to make their appraisal and report, (for surely such a question cannot be raised before them; neither their oath nor their duties, as defined by the order of September 15, 1898, (pp. 16–17, *supra*) nor their capacities cover or include such a question nor fit them to pass upon it), *and afterwards* take the chances of inducing the court to go back and take up a question which manifestly, in the nature and logic of things, should have been raised and disposed of, *before* all these steps were taken and proceedings had, the defendant having been thoroughly aware from the first that they must come to naught? Nay, under such circumstances it is hardly reasonable to speak of "*the chances*" of the court's hearing the defendant, if he should attempt, *after the coming in of the report*, to raise this obviously antecedent and fundamental question. Upon the general principles which regulate judicial procedure, it is clear the court would not hear the defendant who had thus failed to speak at the proper time, unless this failure was in some proper way explained and condoned. Indeed, if the court will kindly glance at section 1946 of the Code of North Carolina of 1883, (pp. 8-10, *supra*), and then at the order of September 15, '98, (pp. 16–17, *supra*), it will at once perceive that the chart of the commissioners' duties and powers is such that, neither upon the basis of the Code nor of the order, could it be logically possible

to raise before them this issue, as to the defeat of the right to condemn, by the proviso as to obstruction or hindrance to travel.

In short, our view is that a condemnation proceeding, of the character of that under investigation, substantially embraces two separate and successive proceedings—the first of which concerns only and must determine the existence of the right to condemn, and the second is limited to the subsequent inquiry as to the amount of compensation to be paid, for property adjudged in the first proceeding to be liable to condemnation. To the defendant railroad company, the most essential question is, whether it may retain the exclusive possession and control of its roadway, which it regards as indispensible to the safe and efficient discharge of its great public function and duty, or whether it shall be compelled to receive upon its roadway another company which will have independent and antagonistic rights thereon. Any order which determines that question is a final order in that proceeding; the final order, indeed, to the railroad; and the question of the amount of compensation is essentially another and distinct question and issue, triable before another tribunal, after the court has disposed of the prior and graver question, as to the existence of the right to condemn. To such an extent, indeed, did the trial court take this view of the matter, that it actually, and as we claim erroneously, turned over this secondary phase of the proceeding to its clerk, even authorizing him to select and appoint the commissioners.

CLERK APPOINTED COMMISSIONERS.

Proceedings—

Construction of telegraph lines on railway property before any further order of court.

The Circuit Court by its orders of Sept. 15, 1898, and Oct. 24, 1898:

8. Delegated to its Clerk the power of selecting and ap-

pointing commissioners to assess damages and authorized its Clerk to preside over such commissioners.

9. Delegated to its Clerk powers vested in the court and in the court only.

10. Determined that the telegraph company may condemn, take possession of, construct its lines upon, exercise dominion over and use the land of the railway company before the entry of any further order by the court.

The order of September 15th, 1898, (record p. 36 and pp. 16–17 of this brief) provided (amongst other things) as follows: viz:

(a.) "It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district and summons them before him. * * *"

(b.) "The said commissioners shall hold their meetings in the courthouse of the United States, in the City of Greensboro, over which meetings said clerk shall preside, * * *"

(c.) "The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. * * *"

This order is in direct violation of Section 1945 of the Code of North Carolina which provides (amongst other things) as follows:

"The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the County where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

The full text of this section will be found at p. 43 of the record, and (pp. 7–8 of this brief.)

It is respectfully submitted that the Circuit Court could not rightfully delegate its power to appoint commissioners to S. L. Trogdon, Esq., its clerk.

The Selection of commissioners was a matter of vital importance. The statute imperatively required them to be disinterested and competent freeholders. The questions of competency and disinterestedness were important subjects to be considered by the court in the appointment of such commissioners. It would take one of much boldness to contend that an incompetent freeholder should be appointed. It would take one of greater audacity to suggest that an interested freeholder could impartially discharge the duties of a commissioner. The determination, of the competency and disinterestedness of the freeholders to be appointed, was lodged by law, in the sound legal discretion of the court. It was a burden and duty placed upon the court. If a case arose requiring the appointment of commissioners, the court and the court only could make the appointment. If the court could abdicate its important functions in this matter and clothe its clerk with the power of appointment, it could delegate the power to any other officer of its court, to any member of its bar, to an individual at large.

The powers conferred upon S. L. Trogdon, Esq. (Clerk), were never contemplated by the Act of Congress clothing Circuit Courts of the United States with jurisdiction, and providing for the removal of causes from a State to a Federal tribunal. The Constitution of the United States and the statutes made in pursuance thereof contemplated that judicial power and authority should be exercised by the courts of the United States, and not by a private individual even though such private individual might occupy the ministerial position of clerk of the Federal court. When this cause was removed from the State court to the Federal court, the Railway Company had a right to expect that all judicial power should be exercised by the Court and that all orders affecting its rights should be

ade by this tribunal. No constitutional or statutory provision any State conferring judicial power upon clerks of the urts of that State could (under the Constitution and laws of e United States), invest a clerk of a Circuit Court of the nited States with judicial power when a cause is removed om a State to a Federal court.

The order of September 15, 1898, directed that "**the said ommissioners shall hold their meetings in the court-house the United States in the city of Greensboro,**" notwithanding the fact that much of the land of the railway comny, upon which the telegraph company seeks to condemn a ght of way for its purposes, belongs in *fee simple* to the railay company, in which event (as we understand the applicaon of the statute), the provision in the early part of Section 46 of the Code of North Carolina (bottom of p. 8 and top p. 9, *supra*), in respect to said commissioners that "**They all view the premises described in the petition,**" applies th full force.

The requirement of said order that "**said commissioners all hold their meetings in the court-house of the United ates in the city of Greensboro,**" was, if we are right in our nstruction of the law, in disregard of said provision of the tute. It was greatly prejudicial to the rights of the Railway mpany. The case at bar was one in which it was peculiarly cessary that the commissioners should view the premises. e strongest conceivable reasons exist for a view of the preses where a telegraph company seeks by hostile means and e strong arm of the law to condemn a right of way for its rposes along the narrow strip of land constituting the roadd of a railway company. This proposition, capable of ends elaboration, seems too plain to require discussion.

The order of September 15th, 1898, goes further in respect said meetings. It provides that "the said commissioners ll hold their meetings in the court-house of the United ates, in the city of Greensboro, **over which meetings said erk shall preside.**"

The words "said clerk" refer to S. L. Trogdon, Esq., by whom said commissioners were to be appointed.

Where is the authority for the appointment of this presiding officer? The court might as well have appointed a stranger as its clerk. If it had the power to appoint the one, it had the power to appoint the other. The mandate of the statute (in a proper case in regard to the court), is that, it shall make an order for the appointment of three disinterested and competent freeholders. Where is the authority for the enlargement of this body? Where is the authority for adding, not simply a fourth commissioner, but one clothed with the power of a presiding officer? What were to be the powers and duties of this presiding officer? Was he to guide and direct their deliberations? Was he to charge them as the court charges a jury? Were his powers advisory or mandatory? Were the commissioners to defer to his views, or might they follow their own, where a difference of opinion existed? Did he have a vote in fixing the amount of compensation?

The order of September 15th, 1898, record, page 36, provides that "the first meeting of the commissioners * * * shall be held ten days after notice of their appointment has been served on the parties to this cause." Under this order the clerk fixed the time for the first meeting of the said commissioners. By issuing notice at an early or late day, the clerk could have the commissioners to meet at such time as he, in the exercise of his discretion, wisely or unwisely, might determine, while the statute contemplated that the court, in the exercise of a sound legal discretion, should fix the time for the first meeting of the commissioners. The language of the statute conferred this power upon the court. The order, in violation of the statute, delegated this power to a third person.

Clerk Trogdon's Order of September, 19, 1898.

Mr. Trogdon's order of September 19, 1898, appointing commissioners to assess damages was made without notice to or knowledge of the Railway Company.

Alfred M. Scales, John M. Walker, and J. Addison Hodgin:

"Pursuant to an order made by His Honor Chas. H. Simonton, on the day of September, 1898, to me directed, in the above-entitled cause, manding me to summon three disinterested freeholders as Commission- to assess the damage of the said Southern Railway Co., which may ue to same by the reason of the construction of a line of telegraph along right of way by the plaintiff, the Postal Telegraph Cable Co., and a time for the assembling of said commissioners, and the taking of tes- ny bearing upon the issues by them to be tried; I have this day ap- ted as commissioners in said cause, Alfred M. Scales, John M. Walker, J. Addison Hodgin, residents of the county of Guilford, N. C., of such intment you will, therefore, take notice of, and you are hereby sum- ed to appear and sit upon the hearing of the said cause in the court room e U. S. Circuit Court in Greensboro, N. C., on September 30th, 1898, at clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal is court.

(Signed.) SAM'L L. TROGDON,
Clerk."

o opportunity was given the Railway Company to be heard n the selection of these commissioners. The statute sec. 5, (pp. 7–8 *supra*) required the appointment of "disinterested competent freeholders," and the order of the Circuit Court d September 15, 1898, provided: "It is ordered that S. Trogdon, Esq., clerk of this court at Greensboro, North olina, do appoint three disinterested and competent free- lers, resident in this district, and summons them before "; but the order of Mr. Trogdon dated September 19, 8, though reciting upon its face that it was made pursuant ue order of September 15, 1898, "commanding me to sum- three disinterested freeholders as commissioners to assess damage," * * does not purport on its face to appoint nterested and competent freeholders. Mr. Trogdon's er seems to have regarded residence in Guilford County, th Carolina, as the only needed qualification of commis- ers. The fact that Mr. Trogdon mentions residence and s reference to the words "disinterested and competent holders" in the appointing part of his order, seems to y that he attached no weight to the latter qualifications. If,

however, he attached importance to either of the statutory words "disinterested and competent freeholders," his use of the word "disinterested" in the reciting part of his order and omission of the word "competent" leaves the impression that the word "competent" was without meaning to him. A freeholder may be "disinterested" and yet wholly incompetent. The statute contemplated that the court would, in the exercise of a sound legal discretion, appoint disinterested and competent freeholders, after the parties interested had an opportunity to be heard upon these questions. Mr. Trogdon did not appreciate the right of the parties to be heard before the appointment of commissioners. He does not appear to have noticed the word "competent," and presumably he attached no importance to that word, in its legal sense, in his selection of commissioners. He did not in his order declare that the three gentlemen appointed by him were disinterested and competent freeholders. No principle of law requires the presumption that Mr. Trogdon appointed men who were actually disinterested and competent freeholders. If Mr. Trogdon appreciated the meaning of the statutory words and knew the gentlemen appointed to be disinterested and competent freeholders it is fair to presume that he would have stated these facts in his order. In the absence of this statement the presumption is that the gentlemen appointed were *not known* by him to be freeholders, and, as above stated, there is no presumption of law that they measured up to the requirement of being disinterested and competent freeholders

---

Appellee's brief filed May 22, 1899, on its motion to dismiss, states in substance (p. 4) that between March 31, 1899, when the Circuit Court of Appeals dismissed appellant's writ of error in this cause and May 5, 1899, when the writ of error was allowed by this Honorable Court and became operative as a supersedeas, the commissioners met and assessed damages; that appellee paid the amount of such damages to the Clerk of the Circuit Court and that appellee then entered upon the

appellant and began and continued the construction of raph lines until stopped by the supersedeas herein.

seems to demonstrate the proposition heretofore by us, namely: that the order of the Circuit Court ctober 24, 1898:

etermined that the Telegraph Company may con- ake possession of, construct its lines upon, exercise on over and use the land of the Railway Company he entry of any further order by the court.

n 1946 of the Code (pp. 8 and 10, *supra*), speaks too upon the proposition just stated to require argument upport.

DOUBT.

-the least—ambiguity or doubt as to whether a statute rants a corporate right, and especially one involving er of Eminent Domain, must be resolved against the ion claiming, by force of the statute, to exercise this rogative. This rule of construction applies with great- when such a statute is invoked by one corporation to e the re-condemnation of property already appropri- der the power of Eminent Domain to another public

ubject is discussed in the following cases:

restern Fertilizing Co., v. *Hyde Park*, 97 U. S., 659.
s River Bridge, v. *Warren*, 12 Curtis, 504.
. Rd. Co., v. *Canal Commrs.*, 21 Pa. St., 22.
ommth., v. *Erie and N. Rd. Co.*, 3 Casey, 351.
Coal Co., v. *Wigton*, 19 Ohio St., 231.
r v. *Marietta & Cin. R. R. Co.*, 11 Ohio St., 231.
y's Case, 2 Blands' Chancery, 99, 100, 129.
t v. *Wallis*, 30 Barbour, 334.
s v. *Clarksburg*, 23 W. Va., 203, 207.
lvania Rd. Co's. Appeal, 93 Pa. St., 150, 159.

CONCLUSION.

y, in closing, we submit in brief some of the consid-

rations in our view properly affecting the *attitude of the court* oward the right claimed by the Telegraph Co., *and the spirit f the construction* which the statute merits, to-wit:

1. The right sought to be exercised involves the construction f statutes conferring a corporate power.

2. The corporate power claimed to be conferred is that of minent Domain.

3. To be exercised against and upon property already appro-riated by the Legislature to a public use.

4. The public use to which the property in question has been ppropriated is one of the most important and vital conceiva-le; constituting the property a great artery along which hrob commerce, the life-blood of the State, and the lives of ier citizens.

5. The new statute, by distinct suggestion, itself, indicates hat the new use is likely to interfere with the old, and if it loes, the consequences may be irreparable, and are certainly ncalculable.

6. Many points concerning the existence and the regulation of the right claimed to be conferred, are involved in doubt and dependent upon the construction of statutes crudely constructed and further complicated by obscure and imperfect reference and inartificial, inconsistent, and inadequate amendment, re-enactment and repeal.

All this enforced by the authorities, from the ablest courts, judges, and text-writers of two continents, emphasizing to the highest and tensest point the duty of strict construction of the statute, and the denial of the right, unless conferred by the Legislature in language too clear to admit of doubt.

Respectfully submitted,

ROBERT STILES,

ADDISON L. HOLLADAY.

Counsel for Plaintiff in Error.

No. 303. IN THE

APR 10 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY,
Plaintiff,
vs.
POSTAL TELEGRAPH-CABLE COMPANY,
Defendant.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Amendment to Opening Brief for Plaintiff in Error, to be read as if inserted at the foot of page 18 of that Brief.

Pages 19 and 20 of "Opening Brief for Plaintiff in Error" are intended as an assignment of errors and seem to comply with both the letter and spirit of Rule 21 of this honorable court, but it may be that greater elaboration is contemplated by that rule, and we respectfully submit the following as perhaps a more formal and exact compliance therewith.

We ask that this paper may be considered and read as an amendment to our opening brief, and as if inserted at the bottom of page 18 thereof.

ROBERT STILES, Richmond, Va.,
ADDISON L. HOLLADAY, Richmond, Va.,
Counsel for Plaintiff in Error.

17,417.)

IN THE

Supreme Court of the United States.

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SOUTHERN RAILWAY COMPANY,

PLAINTIFF,

vs.

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We ask that this paper may be considered and read as an endment to our opening brief, and as if inserted at the tom of page 18 thereof.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

First.

I. The plaintiff in error respectfully submits that said Circuit Court of Appeals erred in its order of March 31, 1899, in holding and deciding that the order of the Circuit Court dated October 24, 1898, was an interlocutory order, and erred in dismissing the writ of error allowed from said Circuit Court to said Circuit Court of Appeals November 29, 1898. Said Circuit Court of Appeals should have held and decided that said order of October 24, 1898, was a final order.

II. Said Circuit Court of Appeals erred in failing to hold that the order of said Circuit Court, of August 31, 1898, overruling appellant's motion to dismiss the petitions filed by appellee in this cause (because said petitions failed to state facts and grounds sufficient to constitute a cause of action) was erroneous. Said Circuit Court of Appeals should have reversed said Circuit Court and sustained appellant's motion to dismiss all of said petitions, for the reasons written out and numbered from 1 to 16 inclusive, to be found at marginal pages 96 to 102 of the record, which said reasons stated in more condensed form are in substance as follows, namely:

1. Because the petitions filed by the Postal Telegraph-Cable Company fail, and each of them fails, to set out facts and grounds constituting a cause of action.

2. Because said petitions are wholly inconsistent. Appellee grounds its application in its first petition and the amendment thereto upon statutes of North Carolina, supposed by it to be in force, and its last petition invokes the act of Congress approved July 24, 1866, to aid in the construction of telegraph lines.

3 (also paragraph 5 and the first clause of paragraph 6). Because no law exists, now in force on the statute books of North Carolina, by which appellee is authorized to condemn

of way for telegraph purposes along and upon the
of appellant, from, to, and between the several points
n the petitions filed in this proceeding.

cause the Superior Court of Guilford county, from
his cause was removed, had no power or jurisdiction
emn the land or property of appellant, as prayed in
itions, or either of them.

cause appellee failed to allege that the property of
t, upon which it seeks to condemn a right of way for
h purposes, is held as an easement or right of way, as
istinguished from land held by a fee simple title.

cause each and every of said petitions fails to describe
upon which said telegraph right of way is sought to
emned, and fails to allege that appellee surveyed the
its proposed right of way and made a map or survey
designating and locating such right of way, and filed
tes of such location, signed by a majority of the direc-
he company, in the clerk's office of the several coun-
ugh or into which its said telegraph lines are to be
ted.

ecause appellee wholly failed to comply with the re-
nts of section 2012 of the Code of North Carolina of
the filing of its petitions and each of them, and the
of proceedings thereunder to condemn the property
llant.

ecause vital provisions contained in section 1944 of
de, have been repealed by an act of the General As-
of North Carolina, ratified March 6, 1883, which said
k from section 1944 the following words, viz:

t the company has surveyed the line or route of its pro-
ad, and made a map or survey thereof, by which such
line is designated, and that they have located their said
cording to such survey, and filed such certificates of
cation, signed by a majority of the directors of the
y, in the clerk's office of the several counties through
which the said road is to be constructed."

11 (and 12). Because section 2012 of the Code of North Carolina of 1883 requires that the mode and manner of ascertaining just compensation for the property or rights condemned, shall be ascertained as prescribed by section 1946 of said Code, and section 1946 of said Code has been repealed in this particular by chapter 160, Acts 1891 of said State, which struck from section 1946 the following words:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

And added to section 1946 the following proviso:

"Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages."

13. Because appellee failed to serve upon appellant, with the summons in this cause, a map showing how the line or route of the right of way sought to be condemned on the property of appellant is located, and the metes and bounds thereof, and failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, or to serve upon appellant any map whatever.

14. Because section 2012 of the Code of North Carolina of 1883 requires that all proceedings for the condemnation of land or any easement therein, for the use of telegraph companies shall be as prescribed in chapter 49 of the Code of North Carolina of 1883 for condemning lands to the use of railroads; and because sections 1944, 1946 and 1952 of said chapter 49 have been amended and changed in vital particulars and repealed so far as applicable to appellant.

15. Because appellee's petitions fail, and each of them fails

clearly and accurately the right of way sought to be
d, its location and the metes and bounds thereof.
ause the laws of North Carolina do not contemplate
have contemplated an indefinite, uncertain, chang-
f way, such as is described in the aforesaid petitions
f them.

SECOND.

in error further submits that the Circuit Court of
red in failing to hold and decide that the order of said
ourt dated September 15, 1898, was erroneous and
reversed:

the sixteen reasons above assigned as error com-
the Circuit Court in its order of August 31, 1898.
use said order of September 15, 1898, was prema-
ered without notice to appellant.
ause neither said order of September 15, 1898, nor
rs, duties, and proceedings of the commissioners
irected to be appointed, as set out in said order,
horized by law.
ause the Circuit Court erred in directing its clerk to
ommissioners to assess damages as therein set
erred in prescribing the oath to be taken by said
ioners.
ause said order erred in directing the mode of pro-
d the principles and rules by which said commis-
hould be governed.
use said order erred in fixing the place for the ses-
id commissioners and how they shall be presided over.
ause said order erred in fixing and prescribing the
to be considered by the commissioners in the as-
of damages and the form and substance of their

THIRD.

f in error further submits that said Circuit Court of
erred in failing to hold that the order of September
by which Samuel L. Trogdon, clerk of said Circuit

Court appointed commissioners to condemn in this cause, was erroneous and should be reversed, because said order was made by said clerk without authority of law and because of the reasons above set out in respect to the order of the Circuit Court dated September 15, 1898.

FOURTH.

Plaintiff in error further submits that the order of said Circuit Court, of October 24, 1898, was erroneous and should have been reversed by said Circuit Court of Appeals, for the following reasons, viz:

1. For all of the reasons above assigned for reversing the orders of said Circuit Court dated August 31, 1898, and September 15, 1898.

2. Because said Circuit Court erred in sustaining appellee's demurrer to appellant's answer.

3. And erred in refusing to allow appellant to introduce evidence in support of the allegations of its answer.

4. And erred in refusing to hear the proofs of appellant and in deciding against appellant without giving it an opportunity to introduce its proofs and be heard.

5. And erred in reinstating said order of the Circuit Court dated September 15, 1898, and in directing the clerk of said Court to fix a day for the meeting of commissioners.

6. And erred in not holding that appellant's answer set up a complete defense.

FIFTH.

Plaintiff in error further submits that said Circuit Court of Appeals erred in failing to hold that the order made by Samuel L. Trogdon, Clerk, dated October 24, 1898, was erroneous and should be reversed for the reasons above assigned in respect to his order of September 19, 1898.

SIXTH.

Plaintiff in error further submits that said Circuit Court of

ed in failing to reverse the order of said Circuit
October 24, 1898, for the following reasons, viz:
se said order of October 24, 1898, deprives appel-
roperty without due process of law, in violation of
tion of the United States.
se said order denies to appellant the equal protec-
aws.
se said order determines, without proof, conditions
the condemnation of appellant's property.
se said order refused to hear the proofs of appel-
quired by section 1945 of the Code of North

se said order refused to permit appellant to intro-
ofs, and denied to appellant an opportunity to be
defence.
se said order without proof determines that appellee
ssession of, use and exercise dominion and control
operty of appellant for the purposes of said tele-
pany, without any further order of said Circuit

se said order, in violation of the Constitution of
States, delegated to the clerk of said court the
lecting and appointing disinterested and competent
to act as commissioners, and authorized said
eside over the meetings of said commissioners.
se said order delegated to said clerk powers vested
uit Court of the United States and in said Circuit

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error.

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IN THE

upreme Court of the United States.

October Term, 1900.

No. 64.

SOUTHERN RAILWAY COMPANY,

PLAINTIFF IN ERROR,

VS.

POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Closing Brief for Plaintiff in Error.

STATEMENT OF CASE.

In our opening brief for the Southern Railway Company, e sole plaintiff in error, we said:

'On the 30th of March, 1899, the Circuit Court of Appeals ed an opinion, holding that no appealable order had been ade by the Circuit Court, and on March 31, 1899, made an der dismissing the writ of error for want of jurisdiction.

The cause was then brought by writ of error to this court, and proper bond having been given, the writ of error operated as a supersedeas; but, upon application of the appellee, this court, in October, 1899, vacated the supersedeas.

"The court, however, refused to dismiss the writ of error, after full argument on the point, and we take that action to be a final adjudication that THE ORDER OF OCTOBER 24, 1898, WAS A FINAL ORDER."

Counsel for the Postal Telegraph-Cable Company, the sole defendant in error, has devoted a large part of his reply brief, filed at the October term 1900, to a repetition of his motion made and denied at the last term, to dismiss the writ of error in this cause, the grounds for his present motion being stated at pp. 12, 22 and 34 of said brief, but nothing new seems to have been added touching the finality of the order to which the writ of error was allowed.

I.

Character of Order of October 24, 1898.

The character of the order of October 24, 1898, was discussed at great length in elaborate printed briefs filed at the last term, and this court then took the matter under advisement for two weeks, and after mature consideration, made an order by which it expressly denied the motion to dismiss and in the same order vacated the supersedeas. No opinion was filed, but the court having had before it the two motions of the defendant in error, (1) to dismiss the writ of error, and (2) if that motion was not sustained, then to vacate the supersedeas, and the opinion of Honorable Charles H. Simonton, in the trial court, refusing to allow the writ of error (which was subsequently allowed by Honorable Nathan Goff), and the elaborate opinion of the Circuit Court of Appeals holding that there was no final judgment from which a writ of error would lie, as well as the printed briefs of counsel for the defendant in error, all of which brought out the motions at issue in the clearest and sharpest

r, and the court having carefully discriminated between
o motions, by vacating the supersedeas and refusing to
s the writ of error, the logical conclusion seems to be
e court considered the order of October 24, 1898, appeal-
ıd the cause one which should be heard upon its merits.
erefore deem it unnecessary, if not improper, to further
s the appealability of the order in question.

owever, we are mistaken in this, we respectfully refer to
inted brief of fifty pages filed early in the October term,
alling special attention to pages 10 and 11, upon which
e found a detailed analysis of the order of October 24,
ınd what that order really settled; pages 17 to 20 inclu-
ıd also pages 39 and 40, in which the jurisdiction of this
is discussed, as dependent upon the final or appealable
ter of said order; and pages 40 to 42, which are devoted
scussion of four North Carolina cases, to-wit: *Telegraph*
Railroad Co., 83 N. C., 426; *Commissioners* v. *Cook county*,
C., 18; *Railroad Co.* v. *Warren*, 92 N. C., 620; *Hendricks*
lroad Co., 98 N. C., 431. These cases, in which the order
ıting commissioners was held not to be a final order under
ıtutes and decisions of North Carolina, were cited by the
of Appeals in its opinion as like cases to the case at bar
e think they are clearly discriminated from the case at
pon said pages 40 to 42 of our brief last referred to.

l lastly, we respectfully call special attention to pages
of our said brief, which pages are devoted to a critical
is and discussion of the case of *Luxton* v. *North River*
Co., 147 U. S. 337, cited by the Circuit Court of Appeals
opinion in the case at bar, and mainly relied on by the
lant in error in support of the position that, an order
ıting commissioners in a condemnation proceeding is not
ı the nature of things cannot be a final or appealable

With some degree of modest confidence we submit
y our discussion of that case it is demonstrated that
ı v. *North River Bridge Co.*, so far from being an authority
s position, really sustains the position for which we con-

tend, to-wit: that the appealable character of an order appointing commissioners in a condemnation proceeding depends upon its real character and effect and that this depends upon the terms, character and effect of the eminent domain statute under which such commissioners are appointed. This is also, in terms, the opinion and decision of this honorable court in *Luxton* v. *North River Bridge Co.*, wherein, at the top of page 338, after a brief discussion of the facts, the court says:

> "At the threshold of the case lies the inquiry whether the order of the Circuit Court appointing commissioners to assess damages for the taking by the petitioner of the respondent's land, is a final judgement upon which a writ of error will lie. This depends upon the terms and effect of the act of incorporation of the petitioner by the Congress of the United States, taken in connection with the general railroad law of the State of New Jersey."

As heretofore said by us, we respectfully submit that—

The Circuit Court by its order of October 24, 1898:

1. Determined that North Carolina statutes are in force under which a telegraph company may condemn a right of way for its purposes upon the property of a railroad.

2. Prohibited testimony showing the value for telegraph purposes of the property to be condemned.

3. Determined that the condemned right of way for telegraph purposes may be unfixed, shifting and changing as to location.

4. Determined that the entire condemnation may be had in one proceeding upon a strip of land, much of which is held in fee-simple (by the railway company), belonging to a single owner and extending through twelve different counties a distance of nearly two hundred and fifty miles.

5. Determined upon demurrer that every defense set up in the answer of the railway company is without merit, even though it were proved by conclusive evidence.

ısed to hear proof as required by section 1945 of the North Carolina.
ermined without proof conditions precedent to con-
on under the North Carolina statutes.
egated to its Clerk the power of selecting and ap-
commissioners to assess damages and authorized
to preside over such commissioners.
egated to its Clerk powers vested in the court and
urt only.
termined that the telegraph company may condemn
session of, construct its lines upon, exercise domin-
and use the land of the railway company before
y of any further order by the court.

II.

ne Cause Prematurely Removed from the State Court to the Federal Court?

ge 22 of his reply brief, counsel for the Telegraph
y contends that this cause was prematurely removed
State Court to the Federal Court, and that the latter
no jurisdiction.
mons was issued and served, requiring the Southern
Company to appear before the clerk of the Superior
Guilford county, North Carolina, on the 22d day of
98, and answer. Had the Railway Company failed to
aid Superior Court, which was in session on that day,
ave appointed three commissioners to condemn the
of the Railway Company, and upon the filing of their
ing the amount of compensation, the Telegraph Com-
ld have paid the same into court, taken possession of
perty, and proceeded to construct its telegraph line
But on June 22, 1898, the Railway Company entered
al appearance for that purpose, filed a petition and
the removal of the cause from the State Court to the
Court of the United States for the Western District of
arolina, and moved the State Court to enter the proper

der of removal, which the latter refused to do, and made an der denying the application, and giving the Railway Company twenty days in which to file its answer. The petition led by the Telegraph Company did not set out the value of he amount in controversy, but the petition for removal stated hat the matter in controversy exceeded, exclusive of interest nd costs, the sum or value of $2,000, and contained all other roper statements required by the statute governing removals. The State Court based its refusal to remove upon its opinion hat the amount in controversy was not shown to exceed $2,000. The petition for removal, when presented to the State Court, became a part of the record of that court, and it appeared on he face of the record—*i. e.*, the pleadings and proceedings down to and including the petition to remove and the removal bond—that the Railway Company had a right to remove the cause to a Federal Court; and, as the record then stood, the Federal Court, not the State Court, was clothed with jurisdiction to determine the question of fact thus presented, viz: the amount involved. See *Burlington* v. *Dunn*, 122 U. S., 515; *Crehore* v. *O. & M. Ry. Co.*, 131 U. S., 240; *Kansas City Ry.* v. *Daughtry*, 138 U. S., 298.

A transcript of the record having been filed in the Circuit Court of the United States for the Eastern District of Virginia, the Telegraph Company moved that court to remand the cause to the State Court, upon the grounds (1) that the amount involved was below the jurisdictional limit, and (2) that even if sufficient, yet the cause had been prematurely removed; upon the hearing of which motions the Railway Company filed four affidavits showing that more than the jurisdictional amount was involved, and, no affidavits having been filed by the Telegraph Company, the Circuit Court refused to remand.

The proceeding in the Superior Court of Guilford county, N. C., was, at the very outset, as shown by the petition of the Telegraph Company, INTER PARTIES AND ADVERSE. See Code of North Carolina, 1883, Sections 2007–2013.

151 U. S., 673.

Subject: Removal of cause to Federal Court.

in v. *Baltimore & Ohio Railroad*, 151 U. S., 686. Mr. ray, in delivering the unanimous opinion of the d:

defendant's petition for the removal of the case ircuit Court of the United States was not filed at the ıer in March or in April. But it was afterwards ıd heard by the State Court before the end of the m. It was therefore filed at or before the time at e defendant was required by the laws of the State to plead to the merits of the case, but after the time at was required to plead to the jurisdiction of the court, tement of the writ.

his a compliance with the provision of the act of Con- 1887, which defines the time of filing a petition for in the State Court? We are of opinion that it was ıore than one reason. This provision allows the peti- removal to be filed at or before the time when the t is required by the local law or rule of court 'to r plead to the declaration or complaint.' These ake no distinction between different kinds of answers and all pleas or answers of the defendant, whether of law by demurrer, or in matter of fact, either by plea to the jurisdiction of the court or in suspension ment of the particular suit, or by plea in bar of the ht of action, are said, in the standard books on plead- ppose or answer' the declaration or complaint which ıdant is summoned to meet. Stephen on Pleading ed.), 60, 62, 63, 70, 71, 239; Lawes on Pleading, 36. iciary Act of September 24, 1789, c. 20, § 12, required ı for removal of a case from a State Court into the Court of the United States to be filed by the defendant ıme of entering his appearance in such State Court.'

1 Stat., 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co.* v. *Speck*, 113 U. S. 84; *Smith* v. *Lyon*, 133 U. S., 315, 320; *In re Pennsylvania Co.*, 137 U. S., 451, 454; *Fisk* v. *Henarie*, 142 U. S., 459, 467; *Shaw* v. *Quincy Mining Co.*, 145 U. S., 444, 449.

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court, **so that if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States.**" * * *

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91 U. S., 367.

Subject: Removal of cause to Federal Court.

In *Kohl* v. *United States*, 91 U. S., 367, this court said:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its

nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided."

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92 U. S., 10.

Subject: Removal of cause to Federal Court.

In *Gaines* v. *Fuentes*, 92 U. S., 10, the Court, in considering the act of March 2, 1867, said:

* * * "This Act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of $500. It mattered not whether the suit was brought in a State Court of limited or general jurisdiction. The only test was, did it involve a controversy between the citizens of the State and citizens of other States? and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

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124 U. S., 197.

Subject: Removal of cause to Federal Court.

In *Searl* v. *School District*, 124 U. S., 199, the action of the Circuit Court in remanding a proceeding to condemn property to the State Court was reversed, and the cause remanded by the Supreme Court of the United States to the Circuit Court of the United States with directions to proceed therein, Mr. Justice Matthews, in delivering the unanimous opinion of the court, said:

* * * "In *Boom Co.* v. *Patterson*, 98 U. S., 403, 406, speaking of a judicial proceeding to appropriate private property to a public use and to fix the compensation therefor, it was said: 'If that inquiry take the form of a proceeding be-

fore the courts, between parties, the owners of the land on one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit;' and among such incidents, it was held in that case was the right, on the ground of citizenship, to remove it from a State to a Federal tribunal for hearing and determination. The same point was ruled in the *Pacific Railroad Removal Cases*, 115 U. S., 1, 18. In *Gaines* v. *Fuentes*, 92 U. S., 10, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by pleadings for judicial determination.

"The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson* and the *Pacific Railroad Removal Cases*, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because, under the Colorado law, the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.

"The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado*

Midland Railway Co. v. *Jones*, 29 Fed. Rep., 193, and by the Circuit Court for the Western District of Michigan by the District Judge, Brown, in the case of *The Mineral Range Railroad Co.* v. *The Detroit and Lake Superior Copper Co.*, 25 Fed. Rep., 515.

"The case was properly removed, and the motion to remand erroneously granted. The judgment of the Circuit Court thereon is accordingly.

"*Reversed, and the cause remanded to the Circuit Court with directions to proceed therein.*"

Counsel for the defendant in error places great reliance upon the case of *Baltimore & Ohio Railroad* v. *Pittsburgh, &c., Railroad*, 17 W. Va., 812, and copies nearly a page from that opinion for the purpose, apparently, of showing that condemnation cases cannot be removed from State Courts to Federal Courts. That case and the doctrine there announced have been carefully considered by this court in a recent case, to-wit:

151 U. S., 673.

Subject: Removal of cause to Federal Court.

In *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S., 683, Mr. Justice Gray, in delivering the opinion of the Court, said:

"In *Baltimore & Ohio Railroad* v. *Pittsburg, &c., Railroad* (1881), 17 W. Va., 812, a petition of the Baltimore & Ohio Railroad Company for the removal into the Circuit Court of the United States of a proceeding for the taking of some of its land for the railroad of a West Virginia corporation, was denied by the courts of West Virginia, upon the ground that the Federal Courts could under no circumstances have jurisdiction of such cases. (17 W. Va., 866–867.) That decision is inconsistent with the decisions of this Court. *Boom Co.* v. *Patterson*, 98 U. S., 403, 407; *Union Pacific Railway* v. *Kansas City*, 115 U. S., 1, 19; *Searl* v. *School District*, 124 U. S., 197." * * * * *

Counsel for the defendant in error will perhaps attempt to differentiate his position from that condemned and pronounced unsound by this honorable court in the extract just given from 151 U. S. He will probably insist that he does not contend that no condemnation case can ever be legally removed from State to Federal Courts, but only that such cases cannot legally be thus removed until they arrive at a certain stage of development, *i. e.*, after the condemnation of the property in question has been determined upon and nothing remains to be done but to fix the amount of compensation. We submit that his position, even thus limited, is unsound; that he has misunderstood the language employed by the courts and misapprehended the real force and meaning of the authorities. While it is true that the United States will not, in any of its departments, interfere with the exercise by a State of its sovereign right of Eminent Domain, in so far as the question of the existence of that right is concerned; yet, where the State has itself attached conditions to the exercise of this right and the owner of the property sought to be appropriated has been summoned into court, and the question is whether these conditions have been fulfilled, then there is "a suit" which is properly a matter of judicial cognizance by the State Court and capable of being legally removed by the defendant into the United States Court; or, as better put in the second paragraph of the syllabus in *Boom Co.* v. *Patterson*, 98 U. S., 403:

"The exercise by the State of its sovereign right of Eminent Domain, cannot be interfered with by the United States; but when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed, is a proper matter for judicial cognizance."

There could scarcely be a more clear cut, legal statement of the character of the proceeding in the case at bar, both upon the defendant's application to remove the cause from the State to the Federal Court, and the plaintiff's motion to remand it.

Under the general head of the Premature Removal of the cause from the State to the Federal Court, counsel for the

defendant in error, upon pages 33–34 of his brief, refers to and cites authorities construing that peculiar feature of the statute law of North Carolina, whereby the term "Court" is, under certain circumstances, to be understood as signifying the "Clerk" thereof;—with regard to which, we remark that:

1st. We fail to perceive the logical relevancy, or bearing of this interpolation.

2nd. It seems clear, from the express phraseology of the North Carolina statute and from the authorities, that the Clerk has no judicial powers, when "issues both of law and fact or issues of fact only" are raised in the pleadings, but his duty under such circumstances is to transfer the cause to the Superior Court docket to be tried at the next ensuing term. See *Clark's Code of Civil Procedure*, Sec. 256, and *Jones* v. *Hemphill*, 77 N. C., 42, and *McAden* v. *Banister*, 63 N. C., 478.

It need scarcely be remarked that the matter embodied in the petition of the Telegraph Company, to-wit: the appointment of commissioners to condemn a right of way for its purposes upon the property of the defendant Railway Company and the answer thereto of the Railway Company *involved numerous issues* both of law and *of fact*, as clearly appears from the extracts from said answer hereinabove given, which answer was filed as soon as permission was given by the court. And in this connection we remark that, had the application of the Telegraph Company for the appointment of commissioners been made to the Clerk of the Superior Court of Guilford county, and had the cause remained in the State Court, it would have been the duty of the Clerk of that court (under section 116 of the Code of North Carolina), immediately upon the filing of the answer of the Railway Company, to transfer the issues of fact raised by said answer to the Superior Court for trial at its next succeeding term, but,

3rd. In the case at bar the Telegraph Company did not even attempt to apply to the Clerk of the State Court to appoint commissioners. On the contrary the Telegraph Company *filed*

its petition before the Superior Court of Guilford county in open court.

4th. When subsequently, the Judge of the Honorable Circuit Court of the United States directed the clerk of that court to appoint the commissioners, said Clerk of said Federal Court did not follow the provisions of the court's order in the premises, which directed him to appoint "three disinterested and competent freeholders resident in this district," (record, marginal page 43); but, in his order making said appointment, said clerk recites the court's order as commanding him "to summon three disinterested freeholders as commissioners" (marginal page 44); and, in actually making said appointment, said clerk merely recites that—"I have this day appointed as commissioners in said cause A. M. Scales, John M. Walker and J. Addison Hodgin, residents of the county of Guilford, N. C."

Thus, in his recital of the court's order, said clerk makes no reference to the required qualification of *competency;* and, in actually making the appointments, takes no note of either of the required qualifications of *competency*, or *absence of interest*, or even of the parties being *freeholders*, but recites only that said parties appointed by him are "residents of Guilford county."

5th. We respectfully submit, that the peculiar feature of the North Carolina statute law under discussion had no legal or proper application to the proceeding in the case at bar, after its removal to the Circuit Court of the United States; because there altogether inappropriate, inconsistent with the terms, and calculated to defeat the purpose and impair the effect of the legislation of Congress, whereby the judicial power of the United States is committed to its several COURTS.

Without deeming the reference necessary, but merely for the

rpose of illustrating several of the suggestions above made, add the following *extracts* from sundry sections of the Code North Carolina (1883), and from decisions of the Supreme urt of that State.

The Code of North Carolina, edition of 1883, provides as llows:

'Sec. 102. *Office of Probate Judge Abolished.*

'The office or place of Probate Judge is abolished, and the duties hereto- e pertaining to clerks of the superior court as judges of probate, shall be rformed by the clerks of the superior court as clerks of said court, and matters pending before said judges of probate shall be deemed trans- red to the clerks of the superior court."

'Sec. 103. *Clerks of the Superior Court; their jurisdiction.* C. C. P., ss. 417, 8.

'The clerks of the superior court have jurisdiction:

* * * * * * *

2) To take proof of wills and grant letters testamentary and of adminis- ation.

3) To revoke letters testamentary and of administration.

* * * * * * *

7) To exercise jurisdiction conferred on them in every other case as pre- ribed by law.

"Sec. 108. *Enumeration of powers.* C. C. P., s. 422.

"Every clerk has power:

* * * * * * *

(7) To preserve order in his court and to punish contempts;

* * * * * * *

(9) To open, vacate, modify, set aside, or enter as of a former time, de- ees or orders of his court, in the same manner as courts of general juris- ction;

(10) To award costs and disbursements as prescribed by law, to be paid ersonally, or out of the estate or fund, in any proceeding before him."

"Sec. 112. *Records to be kept by clerk.* C. C. P., s. 427.

"The following books must be kept by each clerk:

* * * * * * *

(3) A record of all orders and decrees passed in his office, which he is re- uired to make in writing, and not required to be recorded in some other ook:

* * * * * * *

Sec. 116. Issues of fact joined before the clerk to be transferred to the superior court; appeals shall lie to judge. C. C. P., ss. 490, 491, 492. 1873-'4, c. 34, s. 3. 1876-'7, c. 241, s. 5.

"All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term of said court; and appeals shall lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law. In case of such transfer or appeal, neither party shall be required to give an undertaking for costs; and the clerk shall transmit, on such transfer or appeal, to the superior court, or to the judge thereof, the pleadings or other papers, on which the issues of fact or of law arise. An appeal must be taken within twenty days after the entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof."

Sec. 391. *Issues defined; different kinds of issues. C. C. P., s.* 219.

"Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

(1) Of law; and

(2) Of fact.

Sec. 393. *Issue of fact. C. C. P., s.* 221.

"An issue of fact arises—

(1) Upon a material allegation in the complaint controverted by the answer; or

(2) Upon new matter in the answer, controverted by the reply; or,

(3) Upon new matter in the reply, except an issue of law is joined thereon."

Sec. 397. *Trial defined. C. C. P., s.* 223.

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

98. *Issues; how tried. C. C. P., s.* 224.

ssue of law must be tried by the judge or court, unless it be referred.
e of fact must be tried by a jury, unless a trial by jury be waived, or
nce be ordered."

99. *Other issues to be tried by the court or judge. C. C. P., s.* 225.

ry other issue is triable by the court, or the judge thereof, who, how-
ay order the whole issue, or any specific question of fact involved
to be tried by a jury, or may refer it. And when a compulsory
e is ordered either party has the right to have the issues of fact
a jury."

ones v. *Hemphill*, 77 N. C., 42, the third paragraph of the
ns is as follows:

In a special proceeding, if the answer of the defendant
an issue of fact, the clerk should transfe a copy of the
ngs to the civil issue docket for trial at term time; if it
issues of law and fact, a similar transfer should be made,
ues of fact to be tried before a jury and the issues of
be eliminated by the judge and decided by him at the
ime."

Powell v. *Morisey*, 98 N. C., 426, the third paragraph of
labus is as follows:

Where an issue of fact is raised before the clerk, no
ent can be rendered, but the case must be transferred
court for trial. The Code, sec. 116. It is only upon
ons of law where the clerk must give judgment, from
an appeal may be taken."

do not propose, under this head, to enter again upon
eral discussion of the action of the United States Cir-
ourt, or of the clerk of that court, in the regard last
oned, for the purpose of showing error in the proceed-
full discussion of these matters, in this aspect, having
mbodied in our opening brief for the plaintiff in error, at
-77; but we remark that the above extracts from North
na statutes and decisions seem to demonstrate the inappli-
y, inappropriateness and illegality of the importation
court of the United States of the North Carolina practice

ith regard to the conduct of the proceedings by the clerk, nd we submit also that the orders of September 15 and October 4, 1898, to which we objected upon grounds so radical and so aried, have this further sin to atone for, viz: that *they robbed s of our right*, under the Constitution and Statutes of the Jnited States, *to a trial by jury at the bar of the court*. This oint, however, will be presently discussed under the head of rial by jury.

III.

Is the Amount Involved Less than the Jurisdictional Limit of the Circuit Court?

When the Circuit Court removed the cause from the State Court, said Circuit Court had before it simply the affidavit of F. H. Busbee to the removal petition which stated in customary form that "the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of $2,000.00." The State Court had refused to grant the removal under this petition, but the authorities are clear that the Federal Court had the exclusive right to determine whether the jurisdictional amount was involved.

When said Circuit Court refused to remand the cause to the State Court, it had before it—

1. Petition for removal, with affidavit thereto, of F. H. Busbee (record, marginal pp. 8–9).
2. Affidavit of E. T. D. Myers (marginal p. 16).
3. Affidavit of T. M. R. Talcott (marginal pp. 16–17).
4. Affidavit of Frank C. Gannon (marginal pp. 17–18).
5. Affidavit of R. M. Sully (marginal pp. 18–20).

These affidavits conclusively demonstrate that the amount involved largely exceeded the jurisdictional limit of that court, to-wit: $2,000, exclusive of interest and costs. We call special attention to the affidavit of T. M. R. Talcott, marginal p. 16,

of R. M. Sully, marginal pp. 18–20. These gentle-
accomplished railroad experts, and their affidavits
easons given for their conclusions are so clear, logical
nected that extracts therefrom would fail to convey
force.

ition to the affidavits listed above, this honorable court
before it the answer of the plaintiff in error, marginal
4, with the affidavit thereto of C. H. Hudson, its chief
, which, near the bottom of marginal p. 61, states in
e that the damage to the property of the Railway
y from the condemnation sought by the Telegraph
y would amount to an aggregate of not less than
To this answer the defendant in error demurred.
er of October 24, 1898, record, marginal p. 70, and
xceptions No. 3, marginal p. 74.)

**elegraph Company having, on its motion to remand,
ed no affidavits in rebuttal of the above listed affi-
led by the Railway Company, and having, in the
of the cause, demurred to the answer of the Rail-
mpany, which averred that the aggregate damage
tter will exceed $60,000, and the trial court having,
stance of the Telegraph Company, refused to per-
Railway Company to introduce any testimony
r in support of the averments of fact contained in
er, we respectfully submit that, ON THIS APPEAL
S THE RECORD NOW STANDS, this court will
amount involved as exceeding $60,000.**

boots it that the Telegraph Company's petition form-
s that "said poles will be so erected, and said tele-
ine so constructed and maintained as not to obstruct or
he usual travel and business of said railroad company,
ny way interfere with the operation of said company,
any telegraph line now constructed on said right of
See record, marginal page 5.

Railway Company states in substance in its answer
e bottom of marginal page 57 of the record) * "that

rge portion of the lands of this defendant along and upon
ch the petitioning telegraph company seeks to condemn
right of way for its purposes in the various counties speci-
in its said petition, is held by this defendant in fee simple
he said land having been acquired by purchase from the
ginal owners under deeds conveying to this defendant fee
ple title to the same—a title as complete and absolute as
t of any citizen who has purchased land and taken a deed
the same in fee simple."

And the first clause of paragraph 7 of said answer filed by
Railway Company (record, marginal page 58), is as follows:

'7. The complainant's petition states that "said poles will
so erected and said telegraph line so constructed and main-
ned, as not to obstruct the usual travel and business of said
lroad company, nor in any way interfere with the operation
said company, nor with any telegraph line now constructed
said right of way;" but this defendant denies the truth of
d statement, and declares that said poles erected and said
egraph line constructed and maintained, as set out in detail
said petition, will obstruct and hinder the usual travel and
siness of this defendant, and will interfere with the opera-
n of this defendant's railroad company, and with the tele-
aph line now constructed upon this defendant's property;
d this defendant further declares that it will not be possible
construct and maintain a line of telegraph upon its property,
set out in said petition, in such a manner as not to obstruct
hinder the usual travel upon defendant's said railroad.

And paragraph 11 of said answer (marginal p. 60), is as fol-
ws, viz:

"11. Further answering, defendant denies 'that the right
way' of this defendant is 'about 100 feet wide, and it ex-
nds about 50 feet from a line along the centre between the
ils of said main track;' on the contrary, defendant states
at the strip of land along which its tracks are laid and its
ains are run varies greatly in width at different points along

ıd that, at sundry points along said line included in
ed by the condemnation proceedings of the plaintiff,
ss than 100 feet in width, indeed, is so narrow that
telegraph line thereupon in the manner set out in
on would be impracticable, or, at least would grossly
e safe operation of defendant's railroad and grossly
r hinder the usual travel thereupon."

e first clause of paragraph 12 (bottom of marginal
s follows, viz:

Said petition of the telegraph company contains the
allegations: 'Said telegraph lines when con-
vill in no way damage the property of said railroad
nor impair nor diminish the value of said right of
ailroad purposes, but that the same will be beneficial
ailroad co., and its patrons.' Defendant is advised
llegation is rather a conclusion of law than a state-
act; but, whichever it may be, defendant meets said
with a denial of its truth as a statement of facts,
soundness as a conclusion of law. And, in further
to said allegations, which defendant is advised is
rd as a basis upon which to claim or to argue that
nore than 'nominal damages' should be allowed to
dant, as compensation to it for the condemnation of
rty by the petitioning Telegraph Co., for its pur-
is defendant says that, not only would 'nominal
not be to this defendant that 'just compensation,'
supreme law of the land guarantees to the citizen
property is taken for public use, but, such 'just com-
' for such condemnation of the property of this
as is contemplated and sought in the said petition
intiff, would amount to a very large sum of money—
ch larger, indeed almost incalculably larger, than the
onal limit of this court; indeed, defendant states that
ges to its property from the condemnation sought in
ion of the Telegraph Company, would amount not

less to a sum of $300 per mile of such right of way, or an aggregate for the entire 200 miles of not less than ($60,000) sixty thousand dollars."

These averments of fact were well pleaded. To this answer, to these averments of fact, the Telegraph Company demurred. Its demurrer admitted the facts as fully and completely as if they had been proven by the clearest and most conclusive testimony; but, when the court announced that it sustained the demurrer, counsel for the Railway Company appreciating the gravity of the situation, and being ready to prove the averments of fact contained in its answer and wishing to avoid any technical slip in regard to pleading—*i. e.*, to the effect of the plaintiff's demurrer and the order sustaining it—asked leave to introduce testimony sustaining the averments contained in the answer of the Railway Company. The court, however, refused to permit the Railway Company to introduce any testimony. All of this appears in the order of October 24, 1898 (see order, record, marginal page 70, and bill of exceptions No. 3, marginal p. 74), the first paragraph of which is as follows:

"This day came the defendant Railway Company and by leave of court filed its answer to the complainant's written notice and motion, to which said answer the plaintiff telegraph company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court."

The position taken by the Telegraph Company seems to be that, although it has *admitted* upon the face of the record that, under the circumstances of this case as set out in the answer of the Railway Company, the latter will *as matter of fact* be actually damaged to the extent of not less than $60,000.00 by the proposed condemnation; yet the Telegraph Company asks

this court to hold, *as matter of law*, that the damage to the Railway Company will be merely nominal.

The only basis and foundation vouched by the defendant in error for this remarkable position is what he alleges to be the doctrine of this honorable court announced in *Chicago, Burlington, &c., R. R.* v. *Chicago*, 166 U. S., 226, &c., and certain decisions by certain State Courts, holding that when a telegraph company, in cases of a certain character, condemns the right of way of a railroad for its purposes, the damages to the railroad may be only "*nominal.*"

Whether or not these decisions are, in the general or under any circumstances, authority for the proposition deduced from them by the defendant in error, we do not care now to discuss, but we do submit that they can have no application to the case at bar; that this honorable court will never apply the alleged doctrine of these authorities, upon the preliminary question of the right of removal of a cause from a State to a Federal Court, as settling, adversely to the jurisdiction of the Federal Court, the question of the amount involved in the controversy.

More particularly, the alleged doctrine of these authorities will not be applied in a case where, as in the case at bar, the telegraph company, resisting the jurisdiction of the Federal Court, has admitted upon the face of the record—that a large portion of the right of way of the railway company, sought to be condemned by the telegraph company for its purposes, is held by purchase under fee simple deeds (record, marginal page 57); that such right of way varies greatly in width, at sundry points covered by the condemnation proceedings, being so narrow that to erect a telegraph line thereupon would be impracticable, or, at least, would grossly imperil the safe operation of the defendant's railroad, and grossly obstruct or hinder the usual travel thereupon (m. p. 60); that "just compensation" for the property sought to be condemned in the plaintiff's petition, would amount to a sum almost incalculably

larger than the jurisdictional limit of the Circuit Court, and that the damages to the railroad from said condemnation would amount to a sum not less than $60,000.00. (M. p. 61.)

And most especially will this alleged rule of "nominal damages" not be applied in a case where, as in the case at bar, the defendant railroad, confident in the soundness of its position, and not relying alone upon the effect of the plaintiff's demurrer to its answer, asked, but was, at the instance of the Telegraph Company, refused permission to introduce evidence establishing the truth of the facts stated in its answer, of which an abstract has hereinabove been given.

In conclusion upon this branch of the argument, we con-fidently submit that, upon such a special state of the record as exists in this case, the alleged rule of "nominal damages" will never be applied by this honorable court; but by this, we would not be understood as in the least admitting that this court has ever laid it down (even as a rule of general application), that when a telegraph company condemns a right of way for its purposes upon the right of way of a railroad, the damages to the railroad are only "nominal." On the contrary we submit that no such rule has ever been announced by this honorable court.

CONDITION PRECEDENT.

Upon page 63 of his brief, under the general head of the Amount Involved in the Controversy, counsel for the defendant in error, says:

"But plaintiff in error asserts in answer 'that it will not be possible to construct or maintain a telegraph line upon its property, as set out in said petition' in such a manner as not to obstruct or hinder the usual travel upon defendant's said railroad.' In other words, by their answer and proof, if permitted to make it, they would thwart the express purpose and will of the Legislature."

The inference is utterly unjustifiable. The statute of North Carolina (if indeed any statute covering the premises is now in force—as to which, see the opening brief for the defendant in error, pages 20–52), does not confer upon telegraph companies the unqualified right to construct, maintain and operate lines of telegraph along the right of way of railroads,—but, at most, only confers that right, *provided* said telegraph lines do not obstruct or hinder the usual travel on such railroads; so that, in making the point that the line proposed to be erected upon the property of the defendant in error will obstruct or hinder the usual travel upon its railroad, the plaintiff in error merely proposes to claim the benefit of the express exception or proviso of the statute.

On pages 69, *et seq*, of his brief, counsel for the defendant in error insists that the limiting proviso of the statute exists only as a "condition subsequent;" but we submit that this very statement amounts to an admission of the soundness of our view. It is implied, not to say asserted, by the defendant in error, that the moment the telegraph line as constructed is found to be an interference with or obstruction of or hindrance to the operation of the railroad, it may be enjoined and should be removed. Surely then, if, as the plaintiff in error avers in its answer and offers to prove, the right of way of its railroad is in sundry places of such a character that the line cannot be constructed as proposed, without such interference, obstruction or hindrance to the railroad, then it is eminently proper to interpose this defense at the outset, and the court will never permit such construction; and thus the condition subsequent, even granting it to be such, has, by the answer and offered proof of the railway company, been transformed into a "condition precedent."

ERROR IN QUOTING STATUTE.

Near the top of page 72 of his brief, counsel for the defendant in error, we will presume inadvertently, misquotes the

North Carolina statute in a vital particular, reciting that the court "may" (instead of "shall") hear the proofs and allegations of the parties. No wonder that the counsel also contends that this provision is not applicable to the case of a railway company seeking to defend against the condemnation of its right of way by a telegraph company; his view being, as prominently appears throughout his brief, that a railroad company has no rights which a telegraph company is bound to respect, and therefore the court in this case should turn a a deaf ear to all the railway company may desire to advance in its defense.

TRIAL BY JURY.

(a) The Circuit Court had no power or authority to appoint commissioners to condemn the property of the Railway Compeny.

(b) "Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of land for public use," 160 U. S., p. 513, and the ascertainment of just compensation by Circuit Courts of the United States, in such cases, cannot be had except in a regular trial by an ordinary jury of the county.

(c) The orders of the Circuit Court and its clerk, mentioned in the assignments of error, are in violation of the Constitution of the United States and the acts of Congress governing in such cases.

We have already, in this closing brief, submitted the proposition that this entire procedure before the Clerk of the Circuit Court of the United States for the Western District of North Carolina was inapplicable, unauthorized and illegal; and in our assignments of error (see record, mar. pp. 28–29 and 131), we charged that the order dated October 24, 1898, which inaugurated these proceedings, was illegal and invalid, because said order—deprived your petitioner of its property without due process of law,—denied to it the equal protection of the laws,—

termined, without proof, conditions precedent to the condemtion of its property,—refused to hear the proofs of your titioner, as required by section 1945 of the Code of North arolina,—refused to permit it to introduce proof,—denied it opportunity to be heard in its defense,—determined, without proof, that the Telegraph Company might take possession , use and exercise dominion and control over, the property petitioner, for the purposes of said Telegraph Company, ithout the further order of court,—delegated to the Clerk of id Circuit Court the power of selecting and appointing commissioners,—authorized said clerk to preside over said commissioners, and delegated to said clerk powers vested in said ircuit Court of the United States and in said Circuit Court ly. To us, these propositions seem self-demonstrative and onclusive of the case.

The third section of the Judiciary Act of March 3, 1886, as orrected by act of August 13, 1888, substantially provides, in espect to a cause removed from a State court and properly ocketed in a Federal court, that—"the cause shall then proeed in the same manner as if it had been originally commenced the said Circuit Court."

When, therefore, the case at bar was removed from the uperior Court of Guilford county to the Circuit Court of the nited States for the Western District of North Carolina and proper transcript of the record duly filed in the latter court, his act of Congress required that proceedings thereafter in aid Circuit Court should be had as if the case "had been riginally commenced in the said Circuit Court."

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113 U. S., 726.

Subject: Procedure in Federal Court.

In *Ex Parte Fiske*, 113 U. S., 726, this court said:

"The petitioner having removed his case into the Circuit Court, has a right o have its future progress governed by the law of the latter court and not

by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed."

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104 U. S., 44.

In *King* v. *Washington*, 104 U. S., 44, the court said:

"The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the act of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal Court gives him."

We respectfully submit, in the light of these principles, that the Circuit Court had no power or authority to appoint commissioners to condemn the property of the Railway Company: that the case at bar is a suit at common law (*Kohl* v. *U. S.*, 91 U. S., 367); and that—if the property of the Railway Company was subject to condemnation—the ascertainment of just compensation could only be had in the Circuit Court by an ordinary jury of the county in a regular trial.

The Seventh Amendment to the Constitution of the United States provides as follows:

"ARTICLE VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Sections 648 and 649 of the Revised Statutes provide as follows:

"Sec. 648. The trial of issues of fact in the circuit courts shall be by jury except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

"Sec. 649. Issues of fact in civil causes in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in

g waiving a jury. The finding of the court upon the facts which may
ner general or special, shall have the same effect as the verdict of a

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2 Pet., 490.

Subject: Procedure in Federal Court. Trial by Jury.

Bank of Hamilton v. *The Lessee of Dudley*, 2 Peters, 490.
ourt, at p. 522, said:

'he plaintiffs in error contend that the court erred in over-
g the motion to appoint commissioners to value the im-
ements in pursuance of the occupant law of Ohio; and
ndering judgment without conforming to that law. The
section of the act provides that 'an occupying claimant,'
mstanced as was the plaintiff in error, 'shall not be evicted
rned out of possession, until he or she shall be fully paid
alue of all lasting and valuable improvements made by
occupying claimant,' 'previous to receiving actual notice
ne commencement of suit,' &c., 'unless such occupying
ant shall refuse to pay the person so setting up and prov-
n adverse and better title, the value of the land without
mprovements made thereon,' &c."

The 2nd section proceeds to direct the court to appoint
missioners to make the valuation, which had been pre-
ed by the preceding section.

The counsel for the defendant in error insists that this law
pugnant to the 10th section of the first article of the Con-
tion of the United States; and to the ordinance of 1787
he government of the northwestern territory.

This court does not think that these questions properly
in the present actual state of this controversy. The 7th
ndment to the Constitution of the United States declares
'in suits at common law, where the value in controversy
l exceed twenty dollars, the right of trial by jury shall be
erved.' This is a suit at common law, and the value in
roversy exceeds twenty dollars. The controversy is not

confined to the question of title. The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury.

"It has been said that the occupant law of Ohio must, in conformity with the 34th section of the Judicial Act, be regarded as a rule of decision in the courts of the United States.

"The laws of the States, and the occupant law, like others, would be so regarded independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the Constitution of the United States and of the State of Ohio, is a rule of property, and of course a rule of decision in the courts of the United States; but that rule must be applied consistently with their constitution.

"Admitting that the legislature of Ohio can give an occupant claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still that legislature cannot change radically the mode of proceeding prescribed for the courts of the United States; or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury."

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3 Pet., 432.

Subject: Procedure in Federal Court. Trial by Jury.

In *Parsons* v. *Bedford*, 3 Peters, 432, this court, in speaking of the Seventh Amendment to the Constitution of the United States, at p. 446, said:

"* * * In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar

which they may assume to settle legal rights. And Con- seems to have acted with reference to this exposition in Judiciary Act of 1879, Ch. 20 (which was contempora- s with the proposal of this amendment); for, in the ninth on, it is provided that 'The trial of issues in fact in the ct courts in all causes, except civil causes of admiralty maritime jurisdiction, shall be by jury'; and in the twelfth on, it is provided that 'the trial of issues in fact in the it courts shall in all suits, except those of equity and of ralty and maritime jurisdiction, be by jury'; and again, e thirteenth section, it is provided that 'the trial of issues ct in the Supreme Court in all actions at law against citi- of the United States shall be by jury.'"

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16 Otto, 408.

Subject: Procedure in Federal Court. Trial by Jury.

Hodges v. *Eastman*, 16 Otto, 408–413, Mr. Justice Harlan, king for this court, said:

* * * The record discloses that the defendants a determination, by the jury, of a part of the facts, while r facts, upon which the final judgment was rested, found by the court to have been conceded or not dis- d. If we should presume that there were no material facts idered by the court beyond those found in the answers to ial questions, then, as we have seen, the facts found do not orize the judgment. If, on the other hand, we should ad- e it to have been defendant's duty to preserve the evidence bill of exceptions, and that, in deference to the decisions he state court, it should be presumed that the 'facts con- d or not disputed at the trial' were, in connection with facts ascertained by the jury, ample to support the judg- t, we then have a case, at law, which the jury was sworn y, determined, as to certain material facts, by the court e. without a waiver of jury trial as to such facts. It was

the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. If, upon the trial, all the facts essential to recovery had been undisputed, or so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact'—that is, of all the material issues of fact—'in the circuit courts shall be by jury,' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. R. S. secs. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons, the judgment below must be reversed."

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113 U. S., 316.

Subject: Procedure in Federal Court. Trial by Jury.

In *Baylis* v. *Travellers' Insurance Co.*, 113 U. S., 316, this court, at page 321, said:

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases

urt without the intervention of a jury, only when the parties waive t to a jury by a stipulation in writing. Rev. Stat., Secs. 648, 649.

constitutional right this court has always guarded with jealousy. *Grymes*, 1 Pet., 469; *DeWolf* v. *Rabaud*, 1 Pet., 476; *Castle* v. *Bullow.*, 172; *Hodges* v. *Easton*, 106 U. S., 408."

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148 U. S., 327.

Subject: Trial by Jury.

Monongahela Navigation Company v. *United States*, 148 U. Mr. Justice Brewer, speaking for the court, said (p. at—

arles River Bridge v. *Warren Bridge*, 11 Pet., 420, 571, Mr. Justice in his opinion, referring to a provision for compensation found in er of the Warren bridge, uses this language: 'They (the legislavide that the new company shall pay annually to the college, in the old one, one hundred pounds. By this provision it appears legislature has undertaken to do what a jury of the country only nstitutionally do: assess the amount of compensation to which lainants are entitled.' "

ed, the only plausible ground for setting afoot such aralled procedure in a court of the United States as d in the case at bar, is to be found in section 914 of vised Statutes, which provides that:

14. The practice, pleadings and forms and modes of proceeding in es, other than equity and admiralty causes, in the circuit and dists, shall conform, as near as may be, to the practice, pleadings and l modes of proceeding existing at the time in like causes in the record of the State within which such Circuit or district courts any rule of court to the contrary notwithstanding."

s held, however, in the case of *Luxton* v. *North River Co.*, 147 U. S., 338, that this "direction," of conformity tate practice and procedure, must "give way, whenever, t the State practice would be inconsistent with the defeat the purpose, or impair the effect of any legislacongress."

In *Southern Pacific Railroad* v. *Denton*, 146 U. S., 208, this ourt, in commenting upon section 914, of the Revised Statutes, said;

"In one of the earliest cases that arose under this act, this ourt said: 'The conformity is required to be 'as near as may e'—not as near as may be possible, or as near as may be racticable. This indefiniteness may have been suggested by purpose: it devolved upon the judges to be affected the duty f construing and deciding, and gave them the power to reect, as Congress doubtless expected they would do, any subrdinate provision in such State statutes, which, in their dgment, would unwisely encumber the administration of he law, or tend to defeat the ends of justice, in their tribunals.' *ndianapolis & St. Louis Railroad* v. *Horst*, 93 U. S., 291, 300, 01."

The sections of the Code of North Carolina providing for he assessment of damages in a condemnation proceeding by hree commissioners to be appointed by the court are in direct onflict with section 648 of the Revised Statutes, and we subnit that they must give way to this act of congress because to dopt the state practice would be inconsistent with the terms, efeat the purpose and impair the effect of legislation of conress. It seems to be plain that after the case at bar had been roperly removed to and was pending upon the docket of the ircuit Court of the United States that proceedings in the latr court should have been governed by section 648, if the roperty of the railway company was subject to condemnation.

This would appear to be sufficiently clear from the authories above cited, but a yet more cogent and conclusive authority to be found in *Chapell* v. *United States*, 160 U. S., 499. In this ase, land for a lighthouse was condemned by the United States, n a proceeding in the District Court of the United States for the District of Maryland, under an act of Congress of August 1, 888, and the objection was taken that the proceeding should ave been in the appropriate court of the State of Maryland, and

g to the practice in the courts of that State, within
e land lay; especially, as the said State of Maryland had
pecial statute providing for just such condemnations by
ed States, and the act of Congress in the premises
l next to no direct provisions regulating the course of
e, but, on the contrary, expressly required, almost in
words of said section 914, that:

> The practice, pleadings, forms and modes of proceeding, in
> ing under the provisions of this act, shall conform, as near as may
> practice, pleadings, forms and proceedings existing at the time in
> in the courts of record of the State within which such Circuit
> Courts are held, any rule of the court to the contrary notwith-

aryland statute provided that the petition be verified
by agent of the United States specially appointed
urpose, and the damages assessed by a sheriff's jury
summoned therefor; but the proceeding was actually
the name of the Secretary of the Treasury, as pro-
the act of Congress aforesaid, and the damages were
by an ordinary jury at the bar of the court. Both
artures from the State practice were made the ground
objection, but this court held that:

provision of the Maryland statute, that a petition in
ty court shall be verified by affidavit of the agent of
ed States, is inapplicable to a petition presented to a
the United States by the officer designated in the act
ess. And the provision requiring a sheriff's jury to
writing, and to return to the clerk of the court, the
y taken before them, has no application to a trial had
ence taken before the court itself.

proceeding, instituted and concluded in a court of
ed States, was, in substance and effect, an action at
hl v. *United States*, 91 U. S., 367, 376; *Upshur County*
135 U. S., 467, 476. The general rule as expressed
evised Statutes of the United States, is that the trial
of fact in actions at law, both in the District Court

and in the Circuit Court, 'shall be by jury,' by which is evidently meant a trial by an ordinary jury at the bar of the court. Rev. Stat., Secs. 566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of land for public uses. The direction in the act of 1888, c. 728, sec. 2, that such proceedings shall conform 'as near as may be' to those 'in the courts of record of the State,' is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States. * * * * *"
160 U. S., 513–14.

In the case at bar great questions have been passed upon by the court; and by its orders vital rights of one of the litigants have been so far settled that, without further order of the court, the possession of his property will pass to the opposite party, who may at once enter and build thereupon his own structures—without the ascertainment of just compensation in the mode prescribed by Congress, indeed, in direct violation of acts of Congress, in violation of the constitutional rights of the suffering party, and without due process of law.

Indeed, in the light of the above discussion, we submit that the action of the Circuit Court would have been not one whit more clearly unauthorized, unwarranted and illegal, if its order had been that an irresponsible party should fix the compensation due to the plaintiff in error, and that the defendant in error, upon paying into court the compensation thus fixed, should have the right to take possession of and control over the property of the railroad, erect its structures thereupon,

and use it so far as necessary for its own purposes, without the further order of the court.

It would seem futile to query whether or not such an order is appealable. If not, then the vital rights of the citizen are at the mercy of the subordinate courts of the country and he is required to submit to illegal, unspeakable and irremedial wrong and outrage, while the doors of this, the highest tribunal in the land, are closed against him.

If, as was said in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 338, the final or appealable character of an order is determined by its legal effect, then there could scarcely be presented to this court a clearer or stronger case of an appealable order.

Effect of Amendment of North Carolina Code.

We come now to the effect of the amendment of the sections of the North Carolina Code under which these proceedings were brought, a discussion of which will be found at pages 87–89 of the reply brief for the defendant in error; but, before really considering the legal construction and effect of this amendment, or rather of these amendments, we desire to call attention to their obvious origin and history.

The most cursory glance at the specific amendments, as said amendments are set forth in the brief of counsel, and at the objections taken for the railroad in the course of these proceedings, as said objections appear upon the face of the record, will demonstrate that the amendments were framed with the special view of nullifying or avoiding the effect of the objections, and framed by some one possessing the most detailed and familiar knowledge of the case at bar. It goes without saying who the framer of these amendments was.

But it is unnecessary to demonstrate by argument what is in effect, substantially admitted. Upon page 88 of said reply brief of defendant in error will be found this paragraph:

"Thus it will be seen that the legislature of North Carolina, cognizable no doubt of the technical pleas entered by this plaintiff in error in this proceeding, so contrary to the policy of the state, made the above amendment, which effectually eliminates every single objection made by the plaintiff in error to the procedure on the part of the defendant in error."

True, counsel for defendant in error adds—"I do not deem that the amendment was necessary in order to maintain this proceeding;" but he cannot hope to escape the effect of the confession of weakness involved in this amendment of a statute affecting a controversy actually pending in the courts, or the obvious inference that he considered his cause hopeless, or at best exceedingly doubtful, under the law as it stood prior to this amendment.

Coming now more strictly to the question whether and to what extent said amendments may be considered to bear upon and affect the case at bar, *as it now stands in this court*, we submit that counsel has misapprehended the law applicable to this question. The Code of North Carolina, in its chapter entitled "Statutes, Repeal and Construction of," (see Code of North Carolina, Vol. 2, Chap. 59), contains this section:

"Sec. 3766. How parts of acts amended to be considered. 1868–'9, c. 270, s. 22. 1870–'1, c. 111.

"Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment."

This section forces upon us this question. If the new provisions are to be considered as having been enacted at the time of the amendment, to what extent, if at all, are such "new provisions" to be considered as affecting pending causes? The counsel for the defendant in error quotes several authorities for the position that, when a statute deals with procedure alone, it may be considered to have retrospective force, *i. e.*, *prima facie*, it applies to all actions, those which have accrued

or are pending, as well as to future actions. We do not care to discuss this proposition; but *how* is such a statute to be applied to pending actions?

Is it, in theory, to be carried back into the past, and applied to what has been done under the old law, from the inception of the cause? One of the authorities quoted by counsel for the defendant in error, to-wit: *Sutherland on Statutory Construction*, sec. 482, gives a definite answer to this question. The quotation as found on pages 88–89 of his brief, is as follows:

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure alone, *prima facie*, it applies to all actions—those which have accrued or are pending and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings."

"From that time" be it observed.

There had been *steps already taken* in the cause, prior to the amendment of the statute. By which law are these steps to be tested? *The status of the case, as to the court in which it was commenced*, was, that it was commenced in the court of one county only, for the condemnation of a continuous right of way extending through many counties—a proceeding which the old law did not allow. Does the new law validate this unauthorized proceeding? There had been *pleadings put in* which were imperfect and defective under the old law, because of the lack of maps, surveys, etc. Will these also be validated by the new law? Conceding, for the sake of argument, that the new law has its application to this *pending case;* yet, does it effect, can it consistently be applied to, *past* as well as *future proceedings* therein?

These questions are every one of them answered by the learned text writer quoted as above, upon this subject, by counsel for the defendant in error, in the very section referred to, and in immediate sequence to the very words quoted by said counsel. Immediately following the words quoted by counsel

for the defendant in error, in this same section 482, the same writer, Sutherland, says:

"But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. * * "

Comment is unnecessary, except to remark that the position announced in the quotation just made would seem to be thoroughly in consonance with sound reason and common sense. So much with regard to the law governing the application of these amendments generally. We desire now to call special attention to the character of one of these amendments.

Amendment of the Law Affecting Measure of Compensation.

In words this amendment is as follows:

"Sec. 4. That section 2012 of said chapter 49 be further amended as follows: By inserting between the words 'chapter' and 'for,' in line 10 of said section, the following: "or any amendments thereto.'" (See brief of counsel for Telegraph Company, pages 87–88).

In order that the force and meaning of the law as amended may be more readily apprehended, we here quote section 2012, with the changes introduced by the amendment printed in italics:

"Sec. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter *or any amendments thereto* for condemning lands to the use of railroads."

The force and meaning of this amendment would seem to be as follows: that whereas the Code of North Carolina of 1883 applied one measure of compensation, in the condemnation of rights of way for telegraph companies, and the new law applies a radically different measure, and whereas, under s. 2012 as it stood in the Code, the proceeding could only be had in accordance with the Code provisions—it is now provided by the amendment that, in cases of such condemnation, the compensation for the right of way taken may be measured and awarded, indifferently, under the old law as it stood in the Code, or the new law as enacted in the amendment.

We do not see how we can be mistaken as to this being the proper construction of the amendment, as it certainly is its purpose; and if we are correct in this view, then we submit that the law as amended is clearly *unconstitutional* and *void*.

That, commissioners should have the right, to-day, to award to a railroad company, whose right of way is condemned for the use of a telegraph company, compensation or damages calculated upon one basis, and to-morrow, or say six months hence, in a like proceeding, under like conditions, to acquire like telegraph rights, by the same telegraph company against the same railroad system, to award compensation fixed upon a radically different basis—is certainly not our idea of "the equal protection of the laws," or of that unvarying and impartial justice, which a settled legal system is designed to secure to every citizen and which is the indispensable basis of modern civilization.

This statute, in its amended form, goes even beyond the illustration given. Under its provisions, the same telegraph company might, on the same day, institute condemnation proceedings in the same court, against two different railroads, traversing the same section of the country, running parallel with each other, similarly situated, and holding their property under like conditions, and, on the same day, separate orders might be entered in each case appointing commissioners to fix

the amount of compensation, who could proceed upon radically different principles; that is to say, the commissioners in one case might proceed under the statute as it stood in the Code of 1883, and the other set of commissioners might proceed under the law as amended by the act of 1891, Chap. 160 of the public laws of North Carolina.

If the measure of compensation may be fixed, indifferently, under the Code of 1883, or the amendment of section 1946, which was enacted in 1891, prescribing a radically different measure of compensation, then the question arises: Who shall determine the law under which the condemnation shall be had? Is that power vested in the condemning corporation? or in the court? or in the commissioners? If the power of electing between these radically different laws is vested in the condemning corporation, it is an unfettered power which cannot be regulated by the courts. If on the other hand, such election can be made by the court, what are the rules and principles by which the court shall be governed in determining whether it will proceed under the old statute or the radically different new statute? and, may the court, on the same day, under substantially the same conditions, proceed in different ways.

It may be contended that the words "or any amendment thereto" should be read "and any amendment thereto;" that is to say, that the court must proceed under the old law except so far as amended, and that, where amended, the court must proceed under the new law. Let us see how this would operate, The Circuit Court in its orders of September 15, 1898, and October 24, 1898, prohibited commissioners from "extending their inquiry as to the benefit to be derived by the telegraph company or the value thereof to it" (record, marginal p. 43), that is to say, this order prohibited the commissioners from considering the value of the property of the railway company for telegraph purposes, even though it should appear that said property was naturally and peculiarly adapted to and in demand at that time for telegraph purposes; while

egislative amendment of 1891, made applicable by the
ıt statute, if the word " or " shall be read " and," requires
ommissioners to consider this element of value. Stated
her words, if the word " or " must be read " and " in this
ection, then and in that event the mode of proceeding
ted by the recent amendment, is in direct opposition to
anguage of the order of September 15, 1898.
ıder these circumstances, how are the commissioners to act?
they to obey the order of the court and disregard the new
te, or are they to disregard the order and obey the new
te? The two are irreconcilable. The commissioners cannot
eed under the order, without disregarding the statute which
lefendant in error says is now applicable, and they cannot
eed as directed by the new statute, without a palpable and
ıtional violation of the order instructing them how to
eed.

Brief Summary of Argument.

'e cannot submit this brief, without an apology to the
t for its ragged and disjointed character; but beg leave to
, in explanation, to the fact that, it is in answer to a reply
f, for the defendant in error, which departs freely from the
inal order of the discussion and fails to notice some of
most important positions assumed in our opening argu-
ıts.
ı brief summary of the argument for the plaintiff in error,
submit:

As to the right and authority to condemn.

here was no law in existence, at the date either of the in-
ion of these proceedings or of the entry of the order ap-
ıting commissioners, under which a telegraph company
ht, in North Carolina, condemn a right of way for its pur-
es upon the strip of land constituting the roadway of a

railroad:—this, because, under the legislation of that State, a telegraph company had no right to proceed under the amended law of Eminent Domain, and said amended law had repealed the old law as it existed in the Code prior to amendment; which old law, but for its repeal, would have regulated Eminent Domain proceedings by telegraph companies.

2. As to remedy and procedure.

Even conceding, for argument's sake, that there was at the time in existence, in North Carolina, a statute applicable in the courts of that State to Eminent Domain proceedings by telegraph companies; yet the construction, by this honorable court, of the two apparently conflicting statutory provisions that proceedings on the common law side of the courts of the United States shall conform as nearly as may be to the practice and proceedings in the courts of the States, and that, cases removed from State to Federal courts shall proceed in the latter as if originally brought therein—clearly indicates that the North Carolina practice, providing for the assessment of damages or award of compensation, in Eminent Domain cases, *by commissioners*, had no application in the Circuit Court of the United States: because, to adopt said practice would be inconsistent with the terms, defeat the purpose, and impair the effect of the legislation of Congress, particularly with regard to the right of *trial by jury*, in cases at common law.

3. Even if legislation of North Carolina, regulating the exercise of the right of Eminent Domain by telegraph companies, had been in existence from the inception of these proceedings, and had also been applicable and effective in the Circuit Court of the United States; yet, neither the orders of that court in the premises, purporting to follow the course mapped out by said legislation, nor the acts and orders of the clerk thereof, purporting to carry into effect said orders of said Circuit Court, were in conformity with the provisions of said

Domain legislation of North Carolina; but, on the , were inconsistent therewith and violative thereof, as lly and in detail set out in the several briefs filed for ntiff in error—and, in particular,

d Circuit Court of the United States for the Western of North Carolina, by its order of October 24, 1898, ned that the entire condemnation of defendant's prop- ght be had in one county and in one proceeding, upon of land extending through twelve counties, much of held by the railroad, *in fee simple.*

id court, by said order, also determined, upon demurrer dant's answer, that the existence of the very condition truction or hindrance to the usual travel " on its road, by he right to condemn is expressly limited or excluded Eminent Domain statute of North Carolina, constituted nse against the proceeding, and refused to allow the nt to prove the special character of its right of way would demonstrate that such obstruction and hindrance evitably follow the erection of the proposed telegraph reupon.

id court, by said order, also delegated to its clerk the of selecting and appointing commissioners to assess the s, and authorized said clerk to preside over the meetings commissioners, which the said clerk, as shown by the actually did.

great respect, we submit that the entire case, as it ap- pon the face of the record, is a legal, or rather illegal, y. Both the law and practice obtaining in the courts th Carolina, in Eminent Domain cases, and the law and e obtaining in the courts of the United States, have nvoked, but neither system has been consistently fol- so that the plaintiff in error has been without the equal ion of the laws, and its property has been taken from

it without due process of law: wherefore it has appealed to this honorable court, which alone has jurisdiction and power to right the great wrong it has suffered in the premises.

Respectfully submitted,

ROBERT STILES,

ADDISON L. HOLLADAY,

Of Counsel for Plaintiff in Error.

Office Supreme Court U.
FILED
MAY 22 1899
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 232.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals, Fourth District.

Motion by the Defendant in Error to Dismiss.

J. R. McINTOSH, RICHMOND, VA.,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. ——

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals, Fourth District.

Motion by the Defendant in Error to Dismiss.

Now comes the defendant in error, The Postal Telegraph-Cable Company, by J. R. McIntosh, counsel, and moves the court to dismiss the writ of error in this cause, (1) because this Court has no jurisdiction of the same; (2) if the motion is not sustained, then that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of

the writ it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon pending said writ of error.

STATEMENT.

On April 11, 1898, The Postal Telegraph-Cable Company, a corporation of New York, having accepted the provisions of the act of Congress, approved July 24, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Military Purposes," filed in the office of the clerk of the Superior Court of Guilford county, North Carolina, a petition, making the Southern Railway Company the sole defendant, to obtain by condemnation the right to construct, maintain and operate a telegraph line along and upon the right of way of the Southern Railway Company from a point on the State line between the States of North Carolina and Virginia, south to Charlotte, and from Greensboro, in Guilford county, to the city of Raleigh, and by amended petition filed by leave of court, same day, from Greensboro to Winston, in the county of Forsythe.

This petition was filed under the provisions of Chapter 49, of the Revised Code of 1883, of North Carolina, and under Sections 2007 and 2013 of said Chapter, which provides that any telegraph company incorporated in North Carolina or any other State shall have the right to construct, maintain and operate lines of telegraph along any railroad in that State, to be so constructed and maintained as not to obstruct or hinder the usual travel on said railroad, upon making just compensation therefor; and further providing in what manner proceedings for condemning such a right should be conducted.

The Southern Railway Company, a corporation of Virginia, appeared and filed its petition for removal on the ground of diverse citizenship, and such proceedings were had that the case was removed into the Circuit Court of the United States for the Western District of North Carolina, (Opinion of Judge

Simonton, 88 Fed. Rep., 303). The railway company resisted the proceedings upon various grounds, among others that there was no law in North Carolina providing for the condemnation of land for rights of way for the use of telegraph companies; that if there was such a law, the petition of the telegraph company did not in essential particulars follow it; and that the petition was too vague and uncertain in its statements of the nature of the tenure by which the railway company held the right of way over which the easement for the telegraph company was sought to be condemned. These objections were overruled (Opinion of Judge Simonton, 89 Fed. Rep., 190), and the Court ordered, on Sept. 15, 1898, as provided by Sec. 1945 of the North Carolina Code of 1883, that three commissioners be appointed to assess the damages which the railway company would sustain by reason of the erection of the petitioner's telegraph line in the manner proposed, and that they should hear the testimony and make their report in writing, and file it with the Clerk of the Court.

Subsequently, upon the petition of the railway company, leave was granted to it, to answer the petition of the telegraph company, and the order for the appointment of commissioners was suspended. A demurrer interposed by the telegraph company to the answer, was sustained. (Opinion of Judge Simonton, 90 Fed. Rep., 30), and by order of Oct. 24, 1898, reinstated the order appointing commissioners. To the granting of these orders, the railroad company applied to Judge Simonton for writ of error and *supersedeas*, which was refused on the ground that no appeal was admissable to the United States Circuit Court of Appeals, except from a final order or decree, and that the orders and judgments complained of, were not final, but merely interlocutory, (opinion of Judge Simonton, Vol. 90 Federal Rep., 211.) Afterwards, upon application to Judge Goff, by the railroad company for *a rehearing*, he set aside the order of Judge Simonton, refusing a writ of error, and granted a writ of error to bring the case before the U. S. Circuit Court of Appeals, when the

defendant in error moved to dismiss the same for the want of jurisdiction, on the ground that the order appealed from, was not a final, but an interlocutory one. The motion was argued before that Court, February 18, 1899, and decided March 30, 1899, sustaining the motion, and dismissing the writ of error for want of jurisdiction, (opinion by Judge Morris, not yet reported, but printed on page 114 of original transcript of record filed in this cause.)

Afterwards, Judge Goff made an order, reinstating the former order of Judge Simonton for the appointment of commissioners, and directing the clerk to summon the commissioners, upon notice to the parties, for the purpose of assessing the damages to which the railway company was entitled, which was accordingly done, and the damages were assessed pursuant to said order by said commissioners, on the 21st day of April, 1899, and their report was filed with the clerk of the court, as directed by the order of Judge Simonton, of Sept. 15, 1898. And, immediately upon the filing of the report, the telegraph company paid to the clerk, for the Southern Railway Company, the amount of damages assessed by said commissioners, taking his receipt therefor, and at once commenced the construction of its telegraph line, as authorized under Sec. 1946 of the Code of North Carolina, and continued on said work until interrupted by *supersedeas* upon the writ of error now pending in this court.

OBJECT OF THE MOTION.

The object of the motion is to have the writ of error in this case dismissed for the want of jurisdiction; but if the motion be overruled or for any cause continued, then to have the *supersedeas* upon the writ of error so modified as to authorize the Defendant in error to occupy the right of way involved in the proceedings and to work thereon pending the writ of error.

ARGUMENT.

The only error of which the Plaintiff in Error can in this

Court be heard to complain, is the ruling of the United States Circuit Court of Appeals, Fourth Circuit, in dismissing the writ of error before it to the Circuit Court for the Western District of North Carolina. Was that error? If it is apparent on the record that the Appellate Court has no jurisdiction on the appeal, it will dismiss it without any motion for that purpose, even if both parties oppose it. In such case the appellant may, of course, have it dismissed on motion thereafter, even though it be resisted by the appellee.

Bruner v. *United States*, 11 How., 163.
Sampson v. *Walsh*, 24 How., 207.
Burnham v. *First National Bank*, 100 U. S. App., 485.
Merriman v. *Petty*, 16 Wall., 338.
Latham's App., 9 Wall., 185.

This proceeding is authorized by the opinion of this court in the case of *E. Tenn., Va. & Ga. R. R. Co.* v. *South Tel. Co.*, 112 U. S. Rep., 306, et seq. That was a condemnation proceeding by the *Telegraph Co.* v. *R. R. Co.*, commenced in the Probate Court of Montgomery county, Ala., and removed to the Circuit Court of the United States for the Middle District of Alabama, where compensation was assessed by a jury and the amount paid to the clerk of the court.

From that judgment a writ of error was brought to this court, when the Telegraph Company moved to dismiss the writ, because, 1, the value of the matter in dispute did not exceed $5,000.00, and if the motion was not granted, then, 2, that the *supersedeas* might be modified so as to allow it to occupy the right of way involved in the proceeding, and to work thereon, pending the writ of error.

Chief Justice Waite, in delivering the opinion of the Court (page 310), said: "The Courts of the United States, on the removal of the proceedings from the Probate Court, were clothed with no greater power in the premises, than the courts of the State would have possessed, if their jurisdiction had been preserved. It follows that, as an appeal from the Pro-

bate Court to the State Court or to the Supreme Court would not have operated to prevent the Telegraph Company from taking possession of the property appropriated, and erecting its wires, pending the appeal, the supersedeas on the writ of error from this Court to the Circuit Court of the United States should be limited in the same way. This provision of the statute is by no means an unusual one, and was intended to prevent delays in the progress of a public work while the parties were litigating in the higher Courts as to the correctness of a preliminary assessment of compensation to be paid an owner of property taken for the public use according to the forms of law."

The judgment of this Court was:

> "*The motion to dismiss because the value of the matter in dispute does not exceed $5,000.00 is denied; but it is ordered that the supersedeas upon the writ of error from this court shall not, during the pendency of the writ, prevent or hinder the telegraph company from occupying the premises appropriated for its use, and proceeding to erect and operate its line of telegraph thereon, after it has paid into the Circuit Court, for the person or corporation entitled thereto, the amount of damages and compensation assessed by the jury empannelled in the Circuit Court.*"

In the first place, I insist that there was no error in the ruling of the United States Circuit Court of Appeals, to which this writ of error was taken. The principle is beyond dispute, that if a court has no jurisdiction, consent cannot give it, and any judgment or decree entered by it would be void.

The jurisdiction of the United States Circuit Court of Appeals is fixed by statute. "The Circuit Court of Appeals has jurisdiction, under the act creating it, only of final judgments or orders of the Circuit or District Court." Sec. 6, Act of Congress, creating Circuit Courts of Appeal.

His Honor, Judge Simonton, in his opinion of the 9th of November, 1898 (Vol. 90, Fed. Rep., 211), held that the orders

pealed from by the writ of error, were not final, but merely erlocutory; from which the right of appeal did not lie, ing:

Bostick v. *Brickerhoff*, 106 U. S., 3.
Life & Fire Ins. Co. of N. Y. v. *Adams*, 9 Pet., 571.
Lata v. *Kilbourne*, 150 U. S., 524.
Burlington v. *Simms*, 153 U. S., 52.
In re Palmyra, 10 Wheat, 502.
Chase v. *Vasques*, 11 Wheat, 429.
Luxton v. *North River Bridge Co.*, 147 U. S., 341.

His Honor, Judge Morris, delivering the opinion of the urt of Appeals, on the 30th of last March (which is not yet ported, but is printed on page 114 in the original transcript this cause filed in this court), sustaining the ruling of Judge monton, and dismissing the writ of error for want of juris-ction, said:

"The contention of the plaintiff in error is that it is not pealing from the order of appointing commissioners, but om the action of the court below in refusing to allow it to troduce testimony to sustain its contention that the pro-sed telegraph line could not be so constructed and operated not to obstruct and hinder the usual travel upon the rail-ad.

"Its contention is that in an adversary proceeding in court r condemnation there are two separate and successive pro-edings. The first of which determines the right to con-emn, and the second the amount of compensation; and that e first of these, even when the right to condemn is sustained, a final and appealable judgment, although not made so by atute.

"There can be found no case in the decisions of the Su-reme Court of the United States which has so held. In the se of *Belmont Bridge* vs. *Wheeling Bridge*, 138 U. S., 287, the upreme Court did hold that the judgment in that case for the ondemnation was a final appealable judgment, but this was

solely upon the ground that the case came to the Supreme Court by writ of error to the Supreme Court of Appeals of West Virginia, and that it had been held by that court that the judgment was final under the West Virginia statute. Mr. Justice Field said: 'The judgment appears to have been considered as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light in exercising an appellate jurisdiction.'

"In *Luxton* vs. *North River Bridge Co.*, 147 U. S., 337-342, Mr. Justice Gray, commenting on the ruling in the case just above quoted, said: 'To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of validity of the condemnation except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the Circuit Court of the United States.'

"Even if the fact was pertinent, in condemnation proceedings under the provisions of the State law when conducted in a Circuit Court of the United States, that the State Court had held the appointment of commissioners to be a final appealable order, the plaintiff in error cannot have the benefit of such a contention in the present case, for the reason that the Supreme Court of North Carolina has decided to the contrary with respect to the very statute under which these proceedings were taken. In *American Union Telegraph Company* vs. *Wilmington, &c., Railroad Company*, 83 N. C., 420, the Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendants' railroad, that no appeal was allowable from the order adjudging that the petitioner

ntitled to the right of way demanded and appointing ssioners to ascertain and report the compensation to be the defendant railroad as damages for the condemned ty. The court said 'upon a careful examination of the , and the portions of the act of February 8, 1872, by ace incorporated with it, and regarding the policy indi- n both to favor the construction and early completion of orks of internal improvement, telegraphic being upon ne footing as railroad corporations, we are of opinion it t intended in these enactments to arrest the proceedings ized by them at any intermediate stage, and the appeal ly from a final judgment. Then and not before may any committed during the progress of the cause and made bject of exception at the time be reviewed and corrected appellate court, and an appeal from an interlocutory is premature and unauthorized.'

Hendrick vs. *Railroad*, 98 N. C., 431, the Supreme Court rth Carolina again held that under the law of that State der appointing commissioners to assess damages is inter- ry, and no appeal will be entertained until after final ent upon the report of the commissioners, and said: case is in all material respects like *Telegraph Co.* vs. *The Co.*, 83 N. C., 420; *Commissioners* vs. *Cook*, 86 N. C., 18; *ad* vs. *Warren*, 92 N. C., 620. They settle the course of ce in such proceedings as the present one and sufficiently he reasons for it.'

case of *Luxton* vs. *North River Bridge Co.*, 147 U. S., 41, above cited, is, we think, conclusive of the present on, for in that case it was held by the Supreme Court of nited States that although the proceedings in the Circuit of the United States were directed by the Act of Con- o be according to the laws of the State within which the o be condemned was located, and by that State law the ntment of the commissioners could be reviewed by the me Court of the State on writ of *certiorari*, yet so much State law as allowed such review was inapplicable to a eding in the Circuit Court of the United States. The

ourt said: 'The case throughout, from the application of the orporation for the appointment of commissioners to assess amages to the owner of the land proposed to be taken, until dgment upon the award of the commissioners or upon verdict a jury, assessing those damages, remains in the Circuit Court f the United States and under its supervision and control. he action of that court in this case, as in other cases on the ommon law side, is not reviewable by this court by writ of rtiorari. *United States* vs. *Young*, 94 U. S., 258; but only by rit of error, which does not lie until after judgment disposing f the whole case and adjudicating all the rights, whether of tle or of damages, involved in the transaction. The case is ot to be sent up in fragments by successive writs of error.'

" Act of September 24, 1789, Ch. 20, sec. 22, 1 Stat. 84. ev. Stat., Sec. 691.

"*Rutherford* vs. *Fisher*, 4 Dall., 22.
"*Halcombe* vs. *McKusick*, 20 How., 552, 554.
"*Louisiana Bank* vs. *Whitney*, 121 U. S., 284.
"*Keystone Co.* vs. *Martin*, 132 U. S., 91.
" *McGourkey* vs. *Toledo & Ohio Railway*, 146 U. S., 536."

I respectfully submit, that for the reasons stated in the pinions of Judges Simonton and Morris, as well as numerous ther authorities, which I deem unnecessary to cite, this court hould sustain the motion to dismiss the writ of error. If for ny reason, however, it is not done at this time, then, under he authority of the case of *E. Tenn., Va. & Ga. R. R.* v. *outhern Tel. Co.*, *supra*, the supersedeas should be so modified s in the language of this court, in that case: " *It shall not, uring the pendency of the writ prevent or hinder the telegraph com-any from occupying the premises appropriated for its use and pro-eeding to erect and operate its line of telegraph thereon, after it has aid into the Circuit Court, for the person or corporation entitled ereto, the amount of damages and compensation assessed by the ry empanelled in the Circuit Court.*"

1946 of the Code of North Carolina of 1883, is ex-
vided :

company, at the time of appraisment, shall pay into
n appraised by the commissioners, then, under that event,
pany may enter, take possession of and hold said lands,
ing the pendency of appeals, and until the final judgment
said appeal or appeals." Thus bringing this case
ain the rule laid down in the case in 112 U. S.,

reme Court of North Carolina, in the case of *Com-*
. *Cook*, 86, N. C., 18, says :

roceeding for the condemnation of land, for work
mprovements, is intended to be summary and direct,
ful purpose in facilitating the proposed work would
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of the prompt method of procedure in such cases
the delay and interruptions incident to an ordinary
promote the completion of the authorized public
nt

se is not in principle distinguishable from that of
R. R. Co., 83 N. C., 420; and as was then decided,
hold that the appeal of the defendant is premature
e dismissed."

e of North Carolina stands in the front rank of the
is great Union in the way of progress. The hun-
anufacturing industries all over the State attest this
er courts have kept in line with the progress of her
The Supreme Court of North Carolina has held that
on to restrain condemnation proceedings, even be-
es are assessed, will be granted where bond is given
fy the land holder against damages that may accrue
of the public improvement.

Wellington & Powellsville R. R. Co. v. *C. & C. R. R. Co.*, 116 N. C., 924; also 114 N. C., 690, and 99 N. C., 11. A *fortiori*, if an injunction would not lie, in this case, under those circumstances, a *supersedeas* should not be allowed at this stage of this proceeding.

SUPERSEDEAS BOND.

I respectfully submit, should this case linger in this court for one, or two, or five years, and then be dismissed, the telegraph company could recover only nominal damages upon the supersedeas bond, for the reason, that it could not recover for any speculative damages, that is, profits that would have accrued to it during the time, had its line been constructed without interruption, such would be *purely speculative*, hence the supersedeas bond is no protection to the telegraph company.

I have filed with the clerk of this court a certified copy of the proceedings of the assessment of damages at Greensboro, N. C., on the 21st of April, 1899, showing that the damages were assessed; I also file a receipt of the clerk to the Telegraph Company, showing that the amount was paid to the clerk of the court for the Railway Company.

Respectfully submitted,

J. R. McINTOSH,

Counsel for Defendant in Error.

No. 303.

Brief of McIntosh for D.

Office Supreme Court U. S.
FILED
OCT 7 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

Filed Oct. 7, 1899.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals Fourth District.

Brief for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

J. R. McINTOSH,
Counsel for Defendant in Error.

IN THE

preme Court of the United States.

OCTOBER TERM, 1899.

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THE SOUTHERN RAILWAY COMPANY,
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DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals
Fourth District.

for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

learned counsel for the plaintiff in error have served
th a copy of their brief resisting my motion in this cause,
ith a notice that they will, on the 10th day of October,

A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, ask leave of the court to file their brief, a reply to my brief filed in this cause on the 22d day of May, 1899.

I take it that they expect me to make some reply, and might misconstrue my action were I to decline to do so. But for that, I would not make reply, for their brief is the same argument made before his Honor Judge Simonton, upon application for a writ of error to his order appointing commissioners in this cause, which was overruled; (See his opinion of the 9th of November, 1898, Vol. 90 Fed. Rep, 211,) and the same argument made before the Circuit Court of Appeals for the 4th District, where my motion to dismiss was sustained by that honorable court, and an opinion handed down by his Honor Judge Morris. (See page 95 of the printed record in this cause).

I respectfully refer this honorable court to the opinions of Judges Simonton and Morris as my argument in behalf of the motion, which the labored argument of the counsel for the plaintiff in error does not answer; also, to § 1946 of the Code of North Carolina of 1883, which is not printed in the brief of the counsel for plaintiff in error (of course, by oversight), which provides as follows:

"If said company, at the time of appraisement, shall pay into court the sum appraised by the commissioners, then under that event, the said company may enter, take possession of and hold said lands, notwithstanding the pendency of appeals, and until the final judgment rendered on said appeal or appeals."

And, in that connection, to the opinion of the Supreme Court of North Carolina, in the case of *Commissioners* v. *Cook*, 86 N. C., 18, viz:

"The proceeding for the condemnation of land, for work for public improvements, is intended to be summary and direct, and its useful purpose in facilitating the proposed work would be defeated if the progress of the work could be arrested by

al whol.y needless in this incipient stage for the protec-
any right or interest of the unwilling landowner. The
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ement.

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v. *R. R. Co*, 83 N. C., 420; and as was then decided,
ow hold that the appeal of the defendant is premature
st be dismissed."

to call the attention of the court to the fact that this
ling was instituted in the State Court of North Carolina
11th day of April, 1898, and thus, as declared by the
e Court of that State, the spirit and purpose of the
s of North Carolina have, by the delays resorted to by
t in error, been postponed already for eighteen months!

, to the case of *Hendrick* v. *Railroad*, 98 N. C., 431, and
d Co. v. *Warren*, 92 N. C., 620; and also to the case of
Tenn., Va. & Ga. R. R. v. *Southern Tel. Co.*, 112 U. S.
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as to the correctness of a preliminary assessment of

compensation to be paid an owner of property taken for the public use according to the forms of law."

Which theory is in line with that expressed by the Supreme Court of North Carolina in the case of *Commissioners* v. *Cook*, *supra*.

The learned counsel for the plaintiff in error, on page 17 of their brief, say: "It should be understood, however, that the plaintiff in error is not appealing from an order appointing commissioners to fix compensation." They are appealing to this Honorable Court from the judgment of the Circuit Court of Appeals, which was an appeal to that court from the order of his Honor, Judge Simonton, appointing commissioners.

As stated by his Honor, Judge Morris, in his opinion, *supra*:

"The Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendants' railroad, that no appeal was allowable from the order adjudging that the petitioner was *entitled to the right of way demanded, and appointing commissioners* to ascertain and report the compensation to be paid to the defendant railroad as damages for the condemned property." (Italics ours.)

I will not now make reply to so much of the brief of the counsel for the plaintiff in error as criticises the action of the Circuit Court in sustaining the demurrer of the Telegraph Company to the answer of the Railroad Company, for the reason that none of those matters will now be considered by this Honorable Court, but respectfully refer the Court to my brief filed in this cause on the 22d day of May, 1899.

This Honorable Court has no jurisdiction in this matter if the order appealed from was not a final one, and the law is:

"If it is apparent on the record that the appellate court has no jurisdiction on appeal, it will dismiss it without any motion for that purpose, even if both parties oppose it." *Bruner* v. *United States*, 11 How., 163; *Sampson* v. *Walsh*, 24 How., 207;

n v. *Petty*, 16 Wall., 338; *Burnham* v. *First National* U. S. App., 485; *Latham's App.*, 9 Wall., 185.

pinion of this Court, in the case of *Luxton* v. *North idge Co.*, 147 U. S. 337–341, I submit, is conclusive of tter; to it I respectfully invite the attention of the

Respectfully submitted,

J. R. McINTOSH,
Counsel for Defendant in Error.

No. 303. 04

Reply Brf. of McIntosh for D.

FILED
APR 20 1900
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States,

Filed April 20, 1900.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

J. R. McINTOSH,
Counsel for Defendant in Error.

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The motion by defendant was to dismiss the writ of error from this court to the Circuit Court of Appeals, or to vacate the supersedeas thereon. The order made by the court was:

"It is now here ordered by the Court that the motion to dismiss be, and the same is, hereby denied, and that the supersedeas on the writ of error from this Court be, and the same is, hereby vacated."

Because of that order denying the motion to dismiss the writ of error, the learned counsel for the plaintiff assume the action of the court to be a final adjudication; that the order of October 24th, 1899, was a final order, and therefore, again in their last brief filed in this cause, reiterate arguments heretofore made by them upon the merits of the case.

I do not consider the refusal of the court to grant the motion to dismiss the writ of error as a final adjudication, holding that the order of October 24, 1898, or any other made by Judge Simonton in this cause was a *final order*, for the reason that none of them were *final orders*, and I take it that this court by its actions merely suspended its judgment upon the motion to dismiss at that time, and sustained the alternative motion to vacate the supersedeas.

I will not treat the case now upon the same line of counsel for plaintiff, for the reason that I feel confident that this court will not hold that the order appealed from was a *final order*, and it not being a *final order*, of course this court has no jurisdiction of the appeal, and that the judgment of the Circuit Court of Appeals sustaining the motion to dismiss the writ of error will, when the matter comes up for proper consideration, be sustained.

For that reason I will decline to take the time of the court in making an argument upon the merits of this case, but will simply refer the court to my brief filed in this cause in reply to the brief of counsel for plaintiff in error last October, and also to my brief upon motion to dismiss appeal and *on the merits*, previously filed in the cause, where I quote the proposition:

"If it is apparent on the record that the appellate court has no jurisdiction on appeal, it will dismiss it without any motion

for that purpose, even if both parties oppose it." Citing *Bruner* v. *United States*, 11 How., 163; *Sampson* v. *Walsh*, 24 How., 207; *Merriman* v. *Petty*, 16 Wall., 338; *Burnham* v. *First National Bank*, 10 U. S. App., 485; *Latham's App.*, 9 Wall., 185; and specially to the opinion in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337–341.

In support of the proposition that the order appealed from, by the writ of error, was not a *final order*, I deem it unnecessary to quote any authorities in addition to those cited in the two briefs heretofore filed by me in this cause; and, it not being a final order, this court will, of course, dismiss it, even though the motion in the cause may be informal.

Respectfully submitted,

J. R. McINTOSH,
Counsel for Defendant in Error.

No. 64.

Reply Brief of McIntosh

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Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1900.

Filed Oct. 1, 1900.

No. 64.

THE SOUTHERN RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals,

FOURTH CIRCUIT.

REPLY BRIEF

FOR DEFENDANT IN ERROR,

BY

J. R. McINTOSH,

Counsel for Defendant in Error.

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POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals, Fourth Circuit.

Reply Brief for Defendant in Error by J. R. McIntosh.

THE CASE STATED.

This was a special proceeding instituted by defendant in error in the Superior Court of Guilford county, North Carolina, to condemn so much of the right of way of the plaintiff in error, in that State, necessary for the construction, maintenance, and operation of its telegraph lines thereon, through the several counties and for the distance specified in its petition of the 11th day of June, 1898 (record, pp. 3–6). and amended petition filed the same day (record, pp. 18–21)

(1) The original petition alleged that the petitioner (the defendant in error) was a corporation duly incorporated under the laws of the State of New York, with authority to construct, maintain, and operate telegraph lines throughout the State of New York and the other States of the United States of America, including the State of North Carolina; and by virtue of Chap. 49 of the Code of North Carolina of 1883, and the Acts of the General Assembly of said State amendatory thereof, desired to construct, maintain, and operate a line of telegraph along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line; thence through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, and Mecklenburg, to the town of Charlotte, in the last-named county; and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham, and Wake, the whole distance being 193 miles.

(2) That when constructed, it would connect with telegraph lines already constructed, owned and operated by petitioner, and others to be constructed, owned and operated by it, making complete telegraph connections throughout the United States of America, Canada, and Mexico, with cable connections with Europe.

(3) That it failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines on the right of way aforesaid of the Railway Company, and that it has given security for the cost of the proceeding.

(4) That the defendant Railway Company extends to and runs within the town of Greensboro, in the said county of Guilford, and has an agent located therein.

(5) That it desired to construct its telegraph line upon the west side of the line of track of said railroad, from the town of Charlotte aforesaid to the said State line, and on the south

side of said railroad track from said town of Greensboro to the city of Raleigh; and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of said right of way, unless it be that at some points of said right of way at that distance from said outer edge there be found obstructions which would prevent the erection of said poles at such points; then in such event petitioner proposes to erect said poles as near said outer edge of said right of way as can be done without any interference with any other line of telegraph or any other obstruction on said right of way.

(6) That the defendant Railway Company (plaintiff in error) is a single line, with a railroad bed constructed at or near the center of its right of way, with its track about 4 feet 8½ inch guage, and has such switches, turn-outs, stations, side-tracks, turn-tables, water-tanks, &c., as is necessary to carry on and operate a single line of railway; that the right of way of said railway is about 100 feet wide, and extends about 50 feet from a line along the center of said rails of said main track.

(7) That the line of telegraph to be constructed by petitioner would be of the best material, and upon the most improved plan, with poles about 26 feet in length, and 1 foot in diameter at the base, and firmly planted in the ground at a depth of not less than 5 feet; and upon such poles would be attached suitable cross-arms about 6 feet in length, fastened near the top of said poles with insulators thereon, on which would be strung, at or near the upper end wires of suitable material and number, to enable petitioner (defendant in error) to promptly transmit all telegraph messages entrusted to it; that there would be about 35 poles to the mile.

(8) That in places where its lines would cross the track, to prevent any interference with any work, use or obstruction, or the operation of any trains of said Railway Company, the poles would be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company (plaintiff in error) as to prevent any interference therewith.

(9) That said cross-arms would extend the same distance on each side of the said poles; that said poles would be so erected, and said telegraph line so constructed and maintained, as not to obstruct or hinder the usual travel and business of said Railway Company, nor in any way interfere with the operations of said company, nor with any telegraph lines now constructed on said right of way.

(10) And in the event said Railway Company (plaintiff in error) should express a desire for the location of said line at some other points on said right of way, than as designated above, or in the event said Railway Company should at any time desire to change the location of its tracks, or construct new tracks or side-tracks where the same do not now exist, the petitioner agrees to remove said poles to such other points on said right of way adjacent thereto, as shall be designated by said Railway Company, upon reasonable notice, and at the expense of petitioner (defendant in error).

(11) That petitioner would not construct its lines, or in any way attach the same to any of the trestle work or bridges of said Railway Company, or upon any of its enbankments.

(12) That said telegraph lines when constructed would in no way damage the property of said railway company or impair or injure the value of said right of way for railroad purposes, but that the same would be beneficial to said railway company and its patrons.

(13) That defendant railway company (plaintiff in error) is duly incorporated and doing business by virtue of its charter, with a right of way 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

(14) That petitioner does not desire by this proceeding to secure the fee to any part of the right of way of said defendant railway company (plaintiff in error) but only to obtain the right to construct, maintain and operate over, along and upon the right of way of said railway company, a telegraph line as aforesaid.

(15) That petitioner prays for the rights and privileges hereinbefore enumerated, for the bona fide purpose of obtaining said easement and right of way, in order to erect, maintain and operate the telegraph line for the benefit and accommodation of the general public; and that a copy of the petition, with notice of time and place be served upon the defendant (plaintiff in error) when the same shall be presented to the Superior Court at least ten days prior to the presentation of the same to the court, and that such proceedings be had and orders made and judgments entered, as are in such cases provided for by statute. Which petition was sworn to.

The amended petition (amended by order of the court, see record, pp. 18–21) has the following allegation:

"And the said Postal Telegraph-Cable Company has, as required by section 5268 of the Revised Statutes of the United States, filed its written acceptance with the Postmaster General of the United States, of all restrictions and obligations imposed by Acts of Congress approved July 24, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for military purposes;' and by inserting the following: 'From the town of Greensboro to the town of Winston, in the county of Forsyth.'"

On the 22nd day of June, 1898, the plaintiff in error filed a petition for removal to the United States Circuit Court for the Western District of North Carolina (record pp. 7–8) in which it is alleged that the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of $2,000, and that the suit is of a civil nature, and that it is a controversy wholly between citizens of different States, which can be fully determined as between them, to-wit: a controversy between petitioner (plaintiff in error), which was at the commencement of this action, and still is, a citizen and resident of the State of Virginia, and the Postal Telegraph-Cable Company, a citizen and resident of the State of New York; together with bond (record, pp. 8–9) for removal.

The Superior Court of Guilford county, North Carolina, in which defendant in error had instituted its proceeding, and before which the application for removal was made, overruled and denied said application for removal, the Court in its judgment denying said application, using the following language:

"The motion of the Southern Railway Company for removal of said cause to the Circuit Court of the United States for the Western District of the State of North Carolina, coming on to be heard by the Court, upon the papers filed, is hereby overruled.

"The Court holding that the amount in controversy is not shown by the pleadings in said cause to be as much as $2,000, and from the fact stated in the petition of the Postal Telegraph-Cable Company, the Court is of the opinion that the amount of damages to which the railroad is entitled from the Telegraph Company, for the rights and privileges set out in said petition, is less than $2,000. Said defendant railway company is given twenty days within which to file its answer with the Clerk of this Court, to the petition of the said Telegraph Company." (Record, pp. 9–10.)

Whereupon the plaintiff in error procured a restraining order from His Honor, Charles H. Simonton, restraining and enjoining the petitioner (defendant in error) from further proceeding in the State Court.

Subsequently the cause was heard on motion by the defendant in error to remand said cause to the State Court, and for, and on the part of, the plaintiff in error to perpetuate the injunction, before His Honor, Charles H. Simonton, at Asheville, North Carolina, when, in an opinion of July 20, 1898, he continued the restraining order until the further order of the court, and refused to remand the cause to the State Court. (Record, pp. 21–24.) The orders of the court thereon, are upon pages 24–25 of the record.

On the 18th day of August, 1898, and after the court had refused to remand the cause, and continued the restraining

rder, the defendant in error filed a petition before His Honor, harles H. Simonton, reciting the petition that it had filed in he Superior Court of the State of North Carolina; its removal o this court; that it was chartered under the laws of New ork, with authority to construct, maintain and operate its nes throughout the United States, including the State of orth Carolina, and had complied with the Acts of Congress f July 24, 1866, and the Revised Statutes 5263 to 5269, and as therefore, authorized to construct its telegraph lines on all ost roads; that said Railway Company's right of way, under he Acts of Congress, was a post road; and that said Telegraph ompany owns and operates connecting telegraph lines hroughout the United States and Canada, with connecting able lines across the Atlantic Ocean; and that it already has nd operates telegraph lines in the said State of North Caro-na; and that the line now proposed to be erected on the right f way of said defendant Railway Company in said State, will onnect with its said lines heretofore constructed in said State, hereby making it a part of the great system of its lines ex-ending through the United States as aforesaid; and that it is ngaged in interstate commerce; that the Railway Company ill not be damaged by the construction and maintenance of etitioner's telegraph line in the manner set out in the petition, nd that it is entitled to only nominal damages for the use of o much of its right of way for its purposes, as prayed for in he petition; that nominal damages to said Railway Company ill be just compensation, for such use.

That under the Acts of Congress aforesaid, it is entitled to he right, without obstruction, hinderance, or delay to con-ruct its telegraph lines as prayed for in the said petition; and rays an order from the court authorizing it to proceed at once ithout delay to construct its lines as prayed for in its petition, pon the execution of a bond to be approved by the court, or lerk, as the court may deem necessary to fully protect the ghts and interests of the Railway Company, conditioned to ay such damages to the Railway Company as may be finally

adjudged against it in said condemnation proceedings (record, pp. 34–35); which petition was by the court overruled, and commissioners directed to be appointed to assess the damages under section 1945 of the North Carolina Code. (See opinion of the court, Sept. 9, 1898, record, pp. 26–33.) And afterwards, on the 15th September, 1898, his Honor Judge Charles H. Simonton, made an order directing S. L. Trogdon, clerk of the United States Court at Greensboro, North Carolina, to appoint three disinterested and competent freeholders, resident in the district, and summon them before him as commissioners to assess the damages which the Southern Railway Company would sustain by reason of the erection of the telegraph poles, and the stretching of the wires thereon, of the Postal Telegraph-Cable Company, as proposed in the petition of said Company to the court, (record, p. 36); to which order of the court plaintiff in error filed bill of exceptions No. 2 (pp. 39–40 of the record).

Afterwards, on the 23d day of September, 1898, his Honor Charles H. Simonton, on application of plaintiff in error for leave to file its answer to the petition filed by defendant in error, ordered that the defendant in error be required to show cause before him at Charleston, in the United States court-room, on the 7th of October next thereafter, why the defendant should not have leave to file its answer as prayed for, and the former order for the appointment of commissioners be vacated and annulled, and that said order be suspended until the further order of the court.

And on the 12th day of October, 1898, plaintiff in error was, by order of the court, permitted to file its answer to the petition of defendant in error, filed in the Superior Court of Guilford county, North Carolina (record, pp. 41–54), to which answer defendant in error filed a demurrer the same day (record, pp. 54–55).

Which demurrer was by the court sustained; the opinion of the court (record, pp. 56–58), filed October 18, 1898; and the former order for the appointment of commissioners reinstated

ober 24, 1898 (record, pp. 58–59); to which order plaintiff error filed bill of exceptions November 14, 1898 (record, 2); and on the 24th day of October, 1898, the court made order making defendant's exceptions a part of the record cord, pp. 63–4).

On November 3, 1898, plaintiff in error filed notice of appeal he defendant in error, as follows: "Please take notice that Southern Railway Company, the defendant above named, eals from the order made in the above entitled cause by Honor, Charles H. Simonton, on October 24, 1898, which er sustains the plaintiff's demurrer to the answer of the endant, and denies the defendant the right to take testiny, and reinstates the order of September 15, 1898, direct- the clerk to appoint commissioners, &c., as will fully ear from said order.

Defendant also appeals from all prior and intermediate ers in said cause." (Record, p. 64.)

On the 14th day of November, 1898, plaintiff in error ved notice upon the defendant in error that it had directed clerk of the United States Circuit Court for the Western trict of North Carolina, at Greensboro, to enter upon the gment docket or other proper order book of said court, t in the condemnation case of Postal Telegraph-Cable mpany against Southern Railway Company, the defendant ealed from the order of the court entered on the 24th day October, 1898, which order sustained the plaintiff's demur- to the defendant's answer to the petition of the plaintiff, l said defendant's right to take testimony in support of the l answer, and reinstates the order of September 15, 1898, ecting said clerk to appoint commissioners to fix compenion to be paid defendant for damages resulting from the ction by the plaintiff of a telegraph line upon its right of y, &c. (Record, p. 65.)

And on November 4, 1898, plaintiff in error presented to s Honor, Judge Charles H. Simonton, a petition for a writ error addressed to the Honorable Judges of the Circuit

Court of the United States for the Western District of North Carolina, alleging that it felt itself aggrieved by the order made by the court on the 24th day of October, 1898, particularly described in its assignment of errors; also by orders made by the said Circuit Court, dated August 31, 1898, and September 15, 1898, and by two orders of the clerk of the Circuit Court of the United States at Greensboro, dated respectively September 19, 1898, and September 24, 1898, saying: "does hereby appeal from said order of the Circuit Court, dated October 24, 1898 (and all of the above recited orders of said Circuit Court and the clerk thereof) to the United States Circuit Court of Appeals, Fourth Circuit, for the reasons set out and specified in the assignment of errors filed herewith; and your petitioner prays that a writ of error may be allowed it; that a transcript of the orders, proceedings and all papers made and duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit; and that said orders of October 24, 1898, and all the other aforesaid orders, may be reviewed and reversed by the United States Circuit Court of Appeals." (Record, p. 66.)

Plaintiff in error, at the same time, filed an assignment of errors. (Record, pp. 67–72.)

Afterwards, on the 9th day of November, 1898, His Honor, Charles H. Simonton delivered an opinion refusing the writ of error to plaintiff in error (record, pp. 72–3), and entered an order to that effect (record, p. 74); and on the same day reinstated the order of September 15, providing for the appointment of commissioners to assess the damages (record, p. 75.)

On the 29th day of November, 1898, His Honor, Nathan Goff, United States Circuit Judge, made an order setting aside the order of the 9th of November, 1898, made by His Honor, Charles H. Simonton, who had heard the cause, and refused to allow the plaintiff in error a writ of error and *supersedeas*, provided the defendant, within ten days, filed in the papers of the cause a bond in the penalty of $1,000, as provided by law,

surety to be approved by one of the judges of the court. ord, p. 80.)

n February 6th, 1889, defendant in error filed a motion in Circuit Court of Appeals for the Fourth Circuit, to dismiss writ of error, as granted improvidently to an order which interlocutory, and not final. (Record, pp, 92–3.)

his motion was by said court sustained. (Opinion of his or, Judge Morris for the court, record, pp. 94, 95, 96 and and judgment of the Circuit Court of Appeals by his or, Judge Nathan Goff, March 31st, 1899, record, page 98.)

nd afterwards, to-wit, on the 1st day of April, 1899, the date of the said Circuit Court of Appeals was issued and smitted to the Circuit Court of the United States for the stern District of North Carolina, at Greensboro. (Record, 98, 99, 100.)

ursuant to said mandate, with the orders of the court eon, assessment of damages to which the plaintiff in error entitled from the defendant in error was made at Greens-, N. C., on the 21st day of April, 1899. A certified copy aid proceedings, together with a receipt of the clerk of said court to the Postal Telegraph-Cable Company, show- that the amount assessed against the defendant in error was l to the said clerk for the Railway Company, has been filed n the clerk of this court.

fterwards, to-wit, May 3rd, 1899, petition for writ of error n *supersedeas* in the United States Circuit Court of Appeals the Fourth Circuit to the Honorable Judges of the said rt of Appeals was filed by the plaintiff in error (record, 101, 102). At the same time assignment of errors was l by the plaintiff in error in said court (record, pp. 102, , 104, 105 and 106). Writ of error was allowed by his nor, Nathan Goff, United States Circuit Judge, on the 3rd of May, 1899 (record, p. 106), and approved by the Hon. ville W. Fuller, Chief Justice, May 5th, 1899 (record, pp. -108). Afterwards the defendant in error entered a motion the Supreme Court of the United States, October term,

1898, in said cause, at the said term, being No. 303, to dismiss the writ of error in said cause, "(1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the writ it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon pending said writ of error." And on the 30th day of October, 1899, this honorable court made an order denying the motion to dismiss, and vacating the *supersedeas* on writ of error from this Court.

I cannot believe this court, by its order of October 30th, 1899, adjudicated the order of Judge Simonton, of October 24th, 1898, to be a final order, but made the order discharging the *supersedeas*, and merely passed the motion to dismiss, for further consideration, when the case is regularly reached upon the docket. I, therefore, respectfully renew the motion to dismiss the writ of error, on the ground that this court has no jurisdiction of the appeal, and, also, respectfully submit an argument for defendant in error, upon the merits as presented by the record in the cause.

Motion to Dismiss.

In support of this motion, on the ground that the order of his Honor, Judge Simonton, of October 24th, 1898, is not a final order, I here copy the opinion of Judge Morris for the Circuit Court of Appeals, sustaining motion of defendant in error, as a conclusive argument upon that point:

Opinion of Judge Morris.

"The rule that a writ of error or appeal does not lie except to a final judgment which determines the controversy between the parties, is so conclusively settled that the burden is upon the plaintiff in error to show that this is a case to which that general rule does not apply.

"The contention of the plaintiff in error is that it is not ap-

from the order appointing commissioners, but from
n of the court below in refusing to allow it to intro-
timony to sustain its contention that the proposed tel-
ne could not be so constructed and operated as not to
and hinder the usual travel upon the railroad.
ontention is that in an adversary proceeding in court
emnation there are two separate and successive pro-
, the first of which determines the right to condemn,
second the amount of compensation; and that the
hese, even when the right to condemn is sustained, is
nd appealable judgment, although not made so by

e can be found no case in the decisions of the Su-
ourt of the United States which has so held. In the
Belmont Bridge v. *Wheeling Bridge*, 138 U. S., 287,
reme Court did hold that the judgment in that case
condemnation was a final appealable judgment, but
solely upon the ground that the case came to the Su-
ourt by writ of error to the Supreme Court of Appeals
Virginia, and that it had been held by that court that
gment was final under the West Virginia statute.
tice Field said: 'The judgment appears to have been
ed as so far final as to justify an appeal from it;
he supreme court of a State holds a judgment of an
court of the State to be final, we can hardly consider
other light in exercising an appellate jurisdiction.'
Luxton v. *North River Bridge Co.*, 147 U. S., 337–342,
tice Gray, commenting on the ruling in the case just
noted, said: 'To have held otherwise might have wholly
the appellate jurisdiction of this court under the Con-
and laws of the United States; for if the highest
the State held the order appointing commissioners to
and conclusive unless appealed from, and the validity
ondemnation not to be open on a subsequent appeal
e award of damages, it is difficult to see how this court
ave reached the question of the validity of the con-

demnation except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the Circuit Court of the United States.'

"Even if the fact was pertinent, in condemnation proceedings under the provisions of the State law when conducted in a circuit court of the United States, that the State court had held the appointment of commissioners to be a final appealable order, the plaintiff in error cannot have the benefit of such a contention in the present case, for the reason that the Supreme Court of North Carolina has decided to the contrary with respect to the very statute under which these proceedings were taken. *American Union Telegraph Co.* v. *Wilmington, &c. Railroad Company*, 83 N. C., 420, the Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendant's railroad, that no appeal was allowable from the order adjudging that the petitioner was entitled to the right of way demanded and appointing commissioners to ascertain and report the compensation to be paid to the defendant railroad as damages for the condemned property. The court said: 'Upon a careful examination of the statute, and the portions of the act of February 8, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceedings authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then and not before may any error committed during the progress of the cause and made the subject of exception at the time, be reviewed and corrected in the appellate court, and an appeal from an interlocutory order is premature and unauthorized.'

"In *Hendrick* v. *Railroad*, 98 N. C., 431, the supreme court of North Carolina again held that under the law of that State

the order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners, and said: 'This case is in all material respects like *Telegraph Company* v. *The R. R. Co.*, 83 N. C., 420; *Commissioners* v. *Coon*, 86 N. C., 18; *Railroad* v. *Warren*, 92 N. C., 620. They settle the course of practice in such proceedings as the present one and sufficiently state the reasons for it.'

"The case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337–341, above cited, is, we think, conclusive of the present question, for in that case it was held by the Supreme Court of the United States that although the proceedings in the Circuit Court of the United States were directed by the act of Congress to be according to the laws of the State within which the land to be condemned was located, and by that State law the appointment of the commissioners could be reviewed by the Supreme Court of the State on writ of *certiorari*, yet so much of the State law as allowed such review was inapplicable to a proceeding in the Circuit Court of the United States. The court said: 'The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners or upon verdict of a jury, assessing those damages, remains in the Circuit Court of the United States and under its supervision and control. The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by writ of *certiorari*. *United States* v. *Young*, 94 U. S., 258; but only by writ of error, which does not lie until after judgment disposing of the whole case and adjudicating all the rights, whether of title or of damages, involved in the transaction. The case is not to be sent up in fragments by successive writs of error.

"Act of September 24, 1789, ch. 20, sec. 22, 1 Stat., 84. Rev. Stat., sec. 691.

"*Rutherford* v. *Fisher*, 4 Dall., 22.

" *Halcombe* v. *McKusick*, 20 How., 552, 554.
" *Louisiana Bank* v. *Whitney*, 121 U. S., 284.
" *Keystone Co.* v. *Martin*, 132 U. S., 91.
" *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S., 536."

ASSIGNMENT OF ERRORS.

The plaintiff in error, in its assignment of errors filed in this cause, May 3rd, 1898 (record, pp. 102–106), assigns as error, " the orders entered in this suit, to-wit, said order entered by said Circuit Court of Appeals, dated March 31st, 1899, and the orders entered by said Circuit Court, dated August 31st, 1898, September 15th, 1898, and October 24th, 1898, and the orders entered by the Clerk of said Circuit Court, dated September 19th, 1898, and October 24th, 1898.

I respectfully submit that neither one of the said several orders is, within itself, a *final order*, and hence the whole together cannot constitute a final order.

ORDER OF CIRCUIT COURT OF APPEALS, OF MARCH 31, 1899.

The order of the Circuit Court of Appeals, of March 31st, 1899, is as follows:

JUDGMENT.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Southern Railway Company,
Plaintiff in error,
v.
Postal Telegraph-Cable Company,
Defendant in error.
} No. 298.

Error to the Circuit Court of the United States for the western district of North Carolina, at Greensboro.

This cause having been called in the regular order for argument and the defendant in error having moved the court to dismiss the writ of error, the said cause was argued generally, by counsel, on the transcript of the record as well as upon the motion to dismiss.

On consideration whereof, the court being of opinion that there was no final judgment of the said Circuit Court in this cause from which a writ of error could lie, it is now here ordered and adjudged by this court that the writ of error sued out in this cause be, and the same is hereby, dismissed with costs.

Let mandate issue.

NATHAN GOFF.

March 31, 1899.

Order entered by Circuit Court, dated August 31st, 1898:

ORDER OVERRULING DEMURRER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

The Postal Telegraph–Cable Company,
v.
The Southern Railway Company.

This cause came before me at Asheville, to be heard on the petition removed into this court and demurrer thereon: it is ordered, adjudged and decreed that the demurrer be overruled.

CHARLES H. SIMONTON,

31st August, 1898. *Circuit Judge.*

Order of Circuit Court of September 15th, 1898:

Order Authorizing Clerk to Appoint Commissioners.

THE UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE CIRCUIT COURT.

The Postal Telegraph-Cable Company,
v.
Southern Railway Company.

It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and sum-

mons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal Telegraph-Cable Company, as proposed in the petition of said company to this court.

That the said commissioners shall take before the said clerk the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said Code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises. The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Company, or the value thereof to it. The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, the said commissioners shall reduce their award to writing and sign and seal the same, and file it with the said clerk of this court at Greensboro.

CHARLES H. SIMONTON,

15th of September, 1898. *Circuit Judge.*

Order of Circuit Court, dated October 24th, 1898:

Order Sustaining Demurrer and Reinstating Order dated September 15th, 1898.

UNITED STATES OF AMERICA, UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

Postal Telegraph Cable-Company,
v.
Southern Railway Company.

This day came the defendant Railway Company and by leave of court filed its answer to the complainant's written notice and motion, to which said answer the plaintiff Telegraph Company demurrred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court.

It is therefore ordered, that the former order made by this court, directing the clerk of this court at Greensboro, North Carolina, to appoint commissioners to asssess the damages in the above-entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts.

24 October, 1898.

CHARLES H. SIMONTON,
Circuit Judge.

Order of clerk of September 19th, 1898:

Notice Appointing Commissioners and Calling Meeting on September 30th, 1898.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN THE CIRCUIT COURT.

The Postal Telegraph-Cable Company,
v.
The Southern Railway Company.

To Alfred M. Scales, John M. Walker and J. Addison Hodgin:

Pursuant to an order made by his Honor Chas. H. Simonton,

on the 15th day of September, 1898, to me directed, in the above-entitled cause, commading me to summon three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Company, which may accrue to same by reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Company, and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court-room of the United States Circuit Court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

[Seal.] SAM'L L. TROGDON, *Clerk.*

Order of clerk of October 24, 1898:

Notice to Commissioners to Meet on Nov'r 3d, 1898.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA. IN THE CIRCUIT COURT, FOURTH CIRCUIT, AT GREENSBORO, OCTOBER 24th, 1898.

The Postal Telegraph-Cable Company } Notice to Commissioners to meet on Novem'r 3d, 1898.
v.
The Southern Railway Company. }

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, Commissioners in the above-entitled case:

You are hereby summoned and directed to appear and be in the courtroom in the U. S. building at Greensboro, N. C.,

November 3rd, 1898, at 10 o'clock A. M., at which time
d place a hearing will be had by you for the purposes ex-
essed in the order of his honor, Charles H. Simonton, au-
orizing your appointment and in the notice heretofore served
you.

Witness my hand and the seal of this court, October 24th,
98.

[Seal.] SAM'L L. TROGDON, *Clerk.*

These are all the orders of the Circuit Court, and the Cir-
it Court of Appeals, to which error has been assigned by
e plaintiff in error, in its assignment of errors in this court.
I will not occupy the time or impose upon the patience of
is court with an argument showing that neither of them is
inal order. That is manifest.

The assignment of errors embraces two orders of the *clerk*
the court, made pursuant to the orders of the Circuit Court.
course, those assignments of error will not be noticed.
ey might properly be endorsed: "Nervous assignments of
ror."

Hence, I insist that, inasmuch as neither of the orders com-
ined of is a final order, altogether they cannot make a final
der, and, therefore, this court has no jurisdiction of this ap-
l, and the writ of error should be dismissed.

Counsel for plaintiff in error, however, undertake to set at
fiance all precedents, by arguing that the order of the Cir-
it Court refusing to hear testimony to support the allega-
ns of their answer to the petition of the defendant in error,
which a demurrer had been sustained, was a final order.

Judge Morris, in his opinion for the Circuit Court of Ap-
ls, answering that, says: "There can be found no case in
decisions of the Supreme Court of the United States
ich has so held."

TWO OTHER GROUNDS FOR DISMISSAL.

I will now present two other grounds for dismassal of the writ of error, for want of jurisdiction.

FIRST.

THE CAUSE WAS PREMATURELY REMOVED FROM THE STATE TO FEDERAL COURT.

This cause was prematurely removed from the State court to the Federal court: hence, the United States Circuit Court obtained no jurisdiction of it.

This cause, as shown from the record, was removed from the State Court of North Carolina, where, under the statutes of that State, it was authorized to be instituted and prosecuted, into the United States Circuit Court, ere it became a suit, a controversy, or a cause of action. It was in its incipient stage.

STATUTES OF NORTH CAROLINA.

Section 2007 of the Code of 1883 of North Carolina provides: "Any telegraph company chartered or incorporated by this or any other State, shall have the right to construct, maintain and operate lines of telegraph along any railroad or other public highway in the State of North Carolina; but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway."

Section 2008 provides: "Such telegraph company shall have power to contract with any person or corporation the owner of any lands or any franchises therein, whereon said line of telegraph is proposed to be erected, for a right of way for the planting, repairing and operation of its poles or other property, and for the erection and occupation of offices at suitable distances, for the public accommodation."

Section 2009 provides: "Said telegraph company shall be entitled to a right of way over the lands, privileges and ease-

ents of other persons and corporations, and the right to erect
oles and establish offices, upon making just compensation
ierefor."

Section 2010 provides: "Whenever such telegraph company
iall fail, on application therefor, to secure, by contract or
greement, such right of way for the purposes aforesaid, over
ie lands, privileges or easements of another person or corpo-
ation, it shall be lawful for such telegraph company, first giv-
g security for costs, to file its petition before the Superior
ourt for the county in which said lands are situated, or in or
irough which said easement, privilege or franchise exists, set-
ng forth and describing the parcels of land, privilege or ease-
ent over which the way, privilege or right of use is claimed;
ie owners of the land, the easement or privilege, and their
ace of residence, if known, and if not known, that fact shall
e stated, and such petition shall set forth the use, privilege or
her right claimed, and must be sworn to; and if the use or
ght be over or upon an easement or right of way, it shall be
fficient to give jurisdiction if the person or corporation own-
g the easement or right of way be made a party defendant;
orided, that only the interest of such parties as are brought
efore the court shall be condemned in any such proceeding;
id if the right claimed be over or upon an easement or right
way extending to or through more counties than one, the
hole right and controversy may be heard and determined in
ie county into or through which said easement or right of
ay extends."

Section 2011 provides: "A copy of said petition, with notice
the time and place that the same shall be presented to the
iperior Court, must be served on the person or persons whose
terests are to be affected by the proceeding, at least ten days
ior to the presentation of the same to said court. If the
rty on which the service is to be made be a corporation, it
iall be sufficient if notice be served on an officer or agent of
e corporation found in the county in which the land or ease-
ent is situated, or upon any other officer of the corporation."

It was under those sections of the statute that the Telegraph Company was proceeding, and under section 2011, above quoted, a copy of its petition, with a notice of the time and place the same would be *presented to the Superior Court*, was served on the appellant on the 11th day of June, notifying it that its petition *would be presented to the Superior Court of Guilford county on the 22d of June, 1898.* That was all that had been done in the proceeding, when the appellee was confronted with an application on the part of the appellant for an order from the court removing the cause to the Circuit Court for the Western District of North Carolina. I insist, therefore, that even if the matter could at any time be removed into the United States Court, it could not have been done at that stage of the proceedings. And in support of this contention, I beg to call the attention of this Honorable Court to the opinion of Mr. Justice Field, in the case of *Boom Co.* v. *Patterson*, 8 Otto., 403, which was a writ of error to the Circuit Court of the United States for the District of Minnesota. The Boom Company was created under the laws of Minnesota, and the owner of the land was a citizen of Illinois. The company was authorized under the laws of Minnesota to enter upon and occupy any land necessary for properly conducting its business; and if such land was private property to apply to the District Court of the county in which it was located for the appointment of commissioners to appraise its value, and take proceedings for its condemnation. The law is so framed as to give proper notice to the owners of the land and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket of the court," the persons claiming an interest in the land being entered as plaintiffs, and the person seeking its condemnation, as defendant. The court is then required to proceed "to hear and determine such cases in the same manner as other cases are heard and determined in the said court."

es of fact arising thereon are to be tried by a jury, unless jury be waived. The value of the land being assessed by jury, or the court, as the case may be, the amount of the ssment is to be entered as a judgment against the company, ch is subject to review by the Supreme Court of the State vrit of error.

ield, J., in delivering the opinion of the court, said:

The only question on which there was any contention in Circuit Court, was as to the amount of compensation the er of the land was entitled to receive, and the principle n which the compensation was to be estimated. But the pany now raised a further question as to the jurisdiction he Circuit Court. Objections to the jurisdiction of the t below, that go to the subject matter of the controversy not to the form merely of its presentation, or to the char- r of the relief prayed, may be taken at any time. They not waived, because they were not made in the court w.

The position of the Company under this head of jurisdic- is this: that a proceeding to take private property for ic use, is an exercise by the State of its sovereign right of ient domain, and with its exercise the United States, a sep- e sovereignty, has no right to interfere by any of its de- ments. *This position is undoubtedly a sound one so far as the of appropriating the property is concerned.* (Italics ours.) right of eminent domain, that is, the right to take private erty for public uses, appertains to every independent gov- ient. It requires no constitutional recognition; it is an bute of sovereignty. The clause found in the Constitu- of the United States providing for just compensation for erty taken, is a mere limitation upon the exercise of the t.

When the use is public, the necessity or expediency of ap- riating any particular property is not a subject of judicial izance. The property may be appropriated by an act of Legislature, or the power of appropriating it may be dele-

gated to private corporations, to be exercised by them in the execution of works in which the public is interested.

"But, notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry takes the form of a proceeding before the court between the parties, the owner of the land on the one side and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State. This proceeding in the present case, before the commissioners appointed to appraise the land, was in the nature of an inquest, to ascertain its value, *and not a suit in the ordinary sense of these terms;* but when it was transferred to the District Court, by appeal from the award of the commissioners, it took under the statute of the State the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.

"The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contention in the District Court. *Turner* v. *Holleran*, 11 Minn., 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted, and we see no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

In the case of *Baltimore, etc., R. R. Co.* v. *P. W. & Ky. R. R. Co.*, 17 W. Va., 812, Mr. Justice Johnson, after quoting in his opinion the language of Justice Field, as above, says:

"In this case the only question was as to the *compensation*

aid to the owner of the land, and we can very well see ontroversy between citizens of different States on this n might be removable to the Federal Court, because it much like any other controversy. As we have already *fore the question of compensation can properly arise, the st of necessity declare that the private property sought to be ated must be condemned; with the question of the appropri- the lands sought to be taken, the government of the United separate sovereignty, unless it is the party seeking the condem- as nothing to do* (italics ours). And no foreign corporation he courts of the United States condemn the land of a citi- a State for the use of such corporation; and if the Fed- urts have not original jurisdiction for such purpose, a ing of that kind instituted in the State Courts cannot ved to the Federal Courts, because the Federal Court der no circumstances have jurisdiction in such cases. ntrary doctrine would destroy every vestige of control State has over its own internal affairs. If there is any ng which is supposed to be sacred to the States, it is le by which the title to its lands shall be vested and di- Take that away, and the principle by which it has the regulate its own internal affairs is gone."

on 2012 of the Code of North Carolina, by virtue of he proceedings in this cause were instituted, provides ws:

proceedings for the condemnation of land, or any t or interest therein, for the use of telegraph campanies, raisal of the land or interest therein, the duties of the sioners of appraisal, the right to file exceptions to the f the commissioners of appraisal, the mode and man- ppeal, the power and authority of the court or judge, judgment, and the manner of its entry and its enforce- nd the right of the company pending the appeal, shall escribed in this chapter, for condemning lands for the ailroads."

Secton 1945 of said chapter provides as follows:

"On presenting such petition to the Superior Court as aforesaid (having reference to petition provided for in section 1944 of the Code, by railroad companies for securing their right of way), with proof of service of a copy thereof, and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings, may answer such petition and show cause against the granting of the prayer of same, and may disprove any facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall *make an order for the appointment of three* disinterested and competent freeholders, who shall reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

When this section is read in connection with sections 2007, 2008, 2009, 2010 and 2011 (which definitely set out what shall be contained in the petition of the telegraph company, it being altogether different from that which must be embraced in the petition of a railroad company for condemning lands for its right of way, as provided in Sec. 1944), it is manifest that the only answer the railroad company could make to the petition of the telegraph company would be to deny the jurisdictional facts required in Section 2007 and 2010 to be alleged, viz: that the telegraph company was incorporated; that it had given security for costs, and that it was unable to secure by contract or agreement such right of way for its purposes; when, if the court, after hearing the proofs and allegations of the parties, was of opinion that no sufficient cause was shown against granting the prayer of the petition, it was required to make an order for the appointment of three disinterested and competent freeholders for the assessment of just compensation or damages. Before any answer was filed by the appellant and before any order was made appointing commissioners, and be-

fore the assessment of damages by the commissioners—in fact before anything was done, except the mere giving notice to the appellant that the appellee *would on the 22nd day of June, 1898, present its petition to the Superior Court of Guilford county, as provided for in section 2011, supra*, the appellant filed its petition and bond, and entered its motion for removal to the Federal Court. The petition and bond for removal were filed in the Superior Court of North Carolina before the petition of defendant in error was presented to the court. All that had been done was the issuance and service of a notice that the petition would that day be presented to the Superior Court. That was all the statute authorized to be done up to that time.

I insist that, if the opinions of the learned courts above quoted from, are to be regarded as authority, then the cause was surely prematurely removed into the United States Court, thereby denying the State court the privilege of passing upon the power of the petitioner to exercise the right of eminent domain. And I submit, under the rulings of the courts above quoted, that until the commissioners had been appointed, and had assessed the just compensation to which the appellant was entitled, and their report had been made to the court, with the right of either party to appeal to the court, at term, there was no such case or *cause of action in any court*, that could authorize the interposition of the Federal Court and give it jurisdiction.

Thus it appears that the statute of North Carolina is almost identical with that of Minnesota, under which the case of *Boom Co.* v. *Patterson, supra*, was conducted, in which Judge Field held: "The position of the company on the head of jurisdiction is this: that a proceeding to take private property for public use is an exercise by the State of its sovereign right of Eminent Domain, and with this exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of Eminent Domain—that is, the right to take private property for public use—appertains to every independent gov-

ernment. It requires no constitutional recognition; it is an attribute of sovereignty. This clause, found in the Constitution of the several States, providing for just compensation for property taken, is a mere limitation upon the exercise of the power. * * *

"The proceeding in the present case, before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, *and not a suit at law* in the ordinary sense of these terms. *But when it was transferred to the District Court by appeal from the award of the commissioners*, it took, under the statutes of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

I insist, therefore, under that high authority, the interposition of the Federal Court, and the removal of the proceeding, when it did, was premature. It had not even been presented to the court, nor gotten before the commissioners; no commissioners had been appointed to ascertain the damages to which the appellant was entitled. Consequently there was no suit at law in the ordinary sense of these terms. It was at that stage a lifeless, inanimate thing, and removed from the womb of the State court ere it assumed the shape and form of "a suit at law"; but according to the opinion of the learned judge, if the appellant had bided its time with patience until the commissioners had been appointed and assessed the damages and made their report, and the case had gotten into the Superior Court, it would have been *a suit at law* in the ordinary sense of these terms, and removable.

It cannot be said that to have waited that long—the appellee having the right after assessment of the damages to pay the amount into court and proceed with the construction of its lines—in the event of a reversal, that the appellant would have suffered incalculable damages, because section 1946 of the Code of North Carolina provides:

"But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then in that event

the money paid into court, or so much thereof as shall be adjudged, shall be returned to said company; and the company shall have no right to hold said land not condemned, but shall surrender possession of the same on demand to the owner or owners, or his or their agents or attorneys. And the court, or judge, shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other processes as may be necessary to carry into effect the final judgment rendered in said proceedings."

Thus ample protection is given the plaintiff in error in any contingency.

Searl v. *School District No. 2*, 124 U. S., pp. 199–200.

Mr. Justice Mathews, for this Court, in his opinion in the above cause commenting upon the law of eminent domain, as it then existed in the State of Colorado, says:

"The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson*, and the Pacific Railroad Removal cases, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. * *

"The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado Midland Railway Co.* v. *Jones*, 29 Fed. Rep., 193, and by the Circuit Court for the Western District of Michigan by the District Judge, Brown, in the case of *The Mineral Range Rail-*

road Co. v. *The Detroit and Lake Superior Copper Co.*, 25 Fed. Rep., 515."

In the *Colorado Midland Railway case*, 29 Fed. Rep., 193, the court said:

"The Legislature may provide under what circumstances and in what manner this compensation shall be determined, and when it has provided that which is equivalent to a suit at law, in which the only controversy remaining to be considered is the amount of compensation, there exists a suit—a controversy—which under the removal act may be removed to the Federal Court provided the citizenship of the parties justify it.

That right of removal has been affirmed in two cases in the Supreme Court, *Boom* v. *Patterson*, 98 U. S., 403; *Union Pacific* v. *City of Kansas*, 115 U. S. So that the question in this case is narrowed to this: whether there was, at the time this petition and bond for removal were filed, such a proceeding pending as could be considered fairly a suit at law, and in which the whole matter of inquiry was the amount of compensation. If there was, then there was a suit which is removable; otherwise not."

The other case referred to by Mr. Justice Mathews approvingly, that of the *Mineral Range R. R. Co.* v. *Detroit & Lake Superior Copper Co.*, 25 Fed. Rep., 515, was this:

A State statute provided that proceedings for the condemnation of lands for railroad purposes should be instituted in the probate court of the proper county; that the necessity for the taking of lands and their value should be determined by commissioners or a jury selected by such court, and that such a proceeding should only be subject to review by the Supreme Court. Under this statute, a railroad company petitioned the probate court for the condemnation of defendant's lands. Defendant answered the petition, and demanded the removal of the cause to the Federal Court. Held, that the case was removable directly from the probate court.

In that case (page 517), Judge Brown said:

"Did the statute for the condemnation of land also provide for an appeal from the probate court to the circuit court, and the framing of an issue there, we should find no difficulty in holding, as was held in that case (*Hess* v. *Reynolds*, 113 U. S., 73,) and *Boom* v. *Patterson*, that the removal should be from the circuit court, and not from the probate court."

Section 1946 of the Code of North Carolina provides:

"They (commissioners) shall report the same (their findings) to the court under their hands and seals, and within twenty days after filing the same any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge, on the hearing, may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper."

Under the statutes of North Carolina, the clerk of the Superior Court is vested with all the powers of the court, in vacation, and the return of the award of the commissioners, provided for in section 1946, above quoted, is made to the clerk, and not to the court. Section 132 of the Code of 1883 provides as follows:

Section 132.

Definition of Court, to Mean Clerk, When.

"In those of the following enactments which confer jurisdiction or power, or impose duties, when the words superior court, or "court" in reference to a superior court, are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

"*McAdoo* v. *Benbow*, 63–461; *Pelletier* v. *Sanders*, 67–261."

Also section 251.

Jurisdiction of Clerk on Pleadings, etc.

"The clerk of the superior court shall have jurisdiction to hear and decide all questions of practice and procedure in this court, and all other matters whereof jurisdiction is given to the superior court, unless the judge of said court, or the court at a regular term thereof, be expressly referred to.

"*McAdoo* v. *Benbow*, 63–461; *McAdoo* v. *Banister*, 63–478; *Johnson* v. *Judd*, 63–498; *Tate* v. *Powe*, 64–644; *Marsh* v. *Cohen*, 68–283; *Com'rs* v. *Blackburn*, 68–496; *Brendle* v. *Heron*, 68–496; *Bryan* v. *Hubbs*, 69–423; *Palmer* v. *Bosher*, 71–291; *McKethan* v. *McNeill*, 74–663."

Section 252.

Any Party May Appeal.

"Any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference to the judge without undertaking

"*Capps* v. *Capps*, 85–408."

It is manifest from these provisions of the Code of North Carolina that, in a proceeding of this kind, the clerk appoints the commissioners and the report of the commissioners is made to him in vacation, and an appeal can then be had to the court at term, and thence after judgment to the Supreme Court.

Hence, under the authorities above cited, with this provision of the North Carolina Code, I insist that this case was prematurely removed, and the Circuit Court of the United States had no jurisdiction of it.

SECOND.

THE AMOUNT INVOLVED IN THIS CONTROVERSY IS LESS THAN $2,000.

Under the removal act of 1875, and the decisions of this

urt, it was doubtless the duty of the State Court, upon the ing of the petition and bond by plaintiff in error, to have tered an order for removal. That court, however, declined do it, because in his opinion, the amount in controversy d not exceed $2,000. The petition of the defendant in ror, presented to the State Court averred that—

"Said telegraph line, when constructed, will in no way mage the property of said railroad company, nor impair r diminish the value of said right of way for railroad purses, but that the same will be beneficial to said railroad mpany and its patrons." Record, p. 5.

It is true the petition for removal averred that the amount controversy exceeded $2,000. The State Court in its judgent said:

"This court holding that the amount in controversy is not own by the pleadings in said cause to be as much as $2,000, l from the facts stated in the petition of the Postal Teleph-Cable Company, the court is of the opinion that the ount of damages to which the railroad is entitled from the egraph company for the rights and privileges sought in l petition are less than $2,000." Record, p. 9.

Afterwards, when the cause had been removed to the Cir Court the defendant in error entered a motion to remand, ch I respectfully submit, the learned Circuit Judge erred verruling. His opinion on that point is as follows (record, 23 and 24):

The grave question made here is upon remanding this se to the State Court. It is contended that this court has urisdiction because of the amount of the matter in controy—that being less than two thousand dollars.

It has been contended with great ability and eloquence that he present case the Postal Telegraph-Cable Company seeks rect its poles on the right of way of the railway company, ch has already been dedicated to a public use. That it is

confined to the public use. That, therefore, in estimating the compensation to be paid the railway company the same rule cannot be followed which obtains in the condemnation of the property of a private person. That such private person holds his property and can put it to any use, and compensation for taking it must be measured accordingly. The railway company holds its property for a public use only, and its compensation must be measured only by the interference with its performance of its public duty, growing out of the public use. That the petition declares an intent in no way to interfere with this public use, and so the compensation to the railway company for putting up the poles and stretching the wires must be nominal. Strong as this line of argument is, and however convincing under other circumstances, it does not apply to the question at issue. That question is, must this case be remanded. The answer to this question depends upon the matter in controversy. What is the matter in controversy? The compensation to be allowed to the railway company for the erection of the poles and stretching of the wires by the telegraph company. The latter allege that this compensation should be nominal. The former allege that it should greatly exceed two thousand dollars. The question is, does it exceed two thousand dollars? On this question the petition of the plaintiff in the State Court and that of the defendant for removal differ, and on it the issue is joined. 'By this phrase,' says the Supreme Court, in *Smith* v. *Adams*, 130 U. S., 168, '*by this phrase*,' 'matter in dispute,' as used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue is one of fact, testimony is taken and its pecuniary value may be determined not only by the money judgment prayed, but in some cases by the increased or diminished value of the property directly affected by the relief prayed as by the pecuniary result to one of the parties immediately from the judgment.

See also *New England Mortgage Co.* v. *Gay*, 145 U. S., 127; *Clay Center* v. *Farmers*, *ibid.*, 224.

"In estimating the amount of the matter in controversy, the court is governed by the claim made, provided that there is no reason to believe that the claim has no *bona fide* existence, and is only made to secure jurisdiction. *Barry* v. *Edmunds*, 116 U. S., 550. This, then, is the mode of ascertaining the amount of the matter in controversy, and it being claimed on the one side that it greatly exceeds two thousand dollars, and wholly denied on the other, the determination of this issue gives this court jurisdiction. The issue must be tried in accordance with the laws of North Carolina in such case made and provided, and on the trial of the issue will come up the points so ably presented by counsel at bar.

"Let an order be entered in the equity cause, continuing the restraining order until the further order of this court.

"Let an order be entered refusing to remand the cause removed."

The cases cited by the learned Circuit Judge to sustain his opinion in that case—*Smith* v. *Adams*, 130 U. S., 168; *New England Mortgage Co.* v. *Gay*, 145 U. S., 127; *Clay Center* v. *Farmers*, *ibid.*, 224, I respectfully submit—fail to sustain the conclusion of the court, but the very contrary. This court in each of those cases dismissed the cause for want of jurisdiction, because the amount in dispute was insufficient.

Mr. Justice Field, in his opinion in the first case cited, page 175, says:

"It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner

are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. So, in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. Not doubting the correctness of the doctrine thus stated, we do not perceive how it can help the appellants." And held that there is not in the case such an amount in dispute as to enable this court to take jurisdiction of the appeal.

In the next case, 145 U. S., at page 130, Mr. Justice Brown, for the court, said:

"It is well settled in this court that when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur."

Citing the case of *Ross* v. *Prentiss*, 3 How., 771, "where a bill was filed to enjoin the marshal from levying an execution of less than $2,000 upon certain property, the value of which was more than $2,000. In this case, as in the other, the argument was made that the defendent might lose the whole benefit of his property by the forced sale under the execution, but the court held that it did not depend upon the amount of any contingent loss, and dismissed the bill. In *Troy* v. *Evans*, 97 U. S., 1, action was brought to recover certain instalments upon bonds, the aggregate of which bonds exceeded $5,000, but the judgment was for less. The case was dismissed, although it appeared that the judgment would be conclusive in another action upon future instalments upon the same bond."

The court concluding the opinion by saying:

"Upon the whole, it appears to us that we have no jurisdiction of this case, and that the writ of error should be dismissed, and it is so ordered."

In the case of *Clay Center* v. *Farmers' Loan & Trust Co.*, me volume, pp. 224–225, Chief Justice Fuller said:

"This was a suit to recover of the city of Clay Center two stalments of hydrant rental for eighteen hundred and fifty ollars each, with interest. These rentals were claimed to be ue under an alleged contract in respect of the erection of ater-works, between the city and one Bonebrake and a Water-orks company, his assignee and successor, and to be payable nder said contract to the Farmers' Loan & Trust Company, ustee in a trust deed to secure bonds issued by the Water-orks Company for the purpose of borrowing money to com-lete the construction of the works. * * *

"The value of the matter in dispute was the accrued rental nd interest, and although the determination that such rental as due and should be paid to the trustee involved the ex-tence and validity of the contract, yet causes of action for ydrant rental which had not accrued but might subsequently ecrue cannot be availed of to make out jurisdiction of the se by this court upon appeal."

In the case at bar the amount involved is the damages to which e Railway Company is entitled by reason of the construc-on of the telegraph line in the manner set out in its petition. he Telegraph Company not only, in its petition addressed to e State Court of North Carolina, averred that the amount volved was merely nominal, but in its application to remand. herefore, the burden of proof to show that the amount in-olved exceeded $2,000 was upon the Railway Company, in e motion to remand. No testimony was offered to show that exceeded $2,000, but upon the contrary, I insist that the ircuit Court should have taken into consideration in passing on the jurisdictional question, upon a motion to remand, hat was the measure of damages to which the railroad com-ny was entitled from the telegraph company as a matter law.

The rule is this: where the law gives no rule, the demand

of the plaintiff must furnish one, but where the law gives the rule, the legal course of action, and not the plaintiff's demand, must be regarded. For instance, if a suit be brought on a promissory note for $100, and the plaintiff claims in his declaration damages to the amount of $5,000, surely the Circuit Court, upon an application to remand, would not retain jurisdiction because the declaration claimed $5,000, when, as a legal proposition, it was manifest to the mind of the court that only $100, with interest, was the real amount involved.

I insist, therefore, that the mere allegation in the petition for a removal, that the amount in controversy exceeds $2,000, with interest and costs, did not *ipso facto* authorize the Circuit Court to retain jurisdiction of the cause, but, upon the contrary, that it was the duty of the court to look into the entire record, which included the petition of the telegraph company, and to take into consideration the *law* governing the measure of damages in such proceedings.

Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S., 226.

I insist that the principle laid down by the Supreme Court of the United States in the case of the *Chicago, B. & Q. R. R.* v. *The City of Chicago*, 166 U. S., 226, as to the measure of damages which the Railroad Company was entitled to receive from the city, when a portion of its right of way was taken for the use of a street, should govern and control in proceedings of this kind. I am sustained in that contention by the Supreme Court of Illinois in the case of *St. Louis, &c. Ry. Co.* v. *Postal Telegraph-Cable Co.*, 173 Ills., 508.

That honorable court says:

"The measure of damages, therefore, suffered by the Railroad Company, is not the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the Railroad Company is diminished by the use of the same by the Telegraph Company for its purposes." Citing

Q. R. R. Co. v. *Chicago*, 149 Ill.; and the same, 166 States, 226.

court, in its opinion in that case, said: "The Railroad ny holds its right of way, so far as is made to appear, for railroad purposes, and is restricted in its use of the r such purposes. Under this view of the estate that lroad Company has in its right of way, it is difficult to the damage sustained by the road can be more than l damages."

on 1957, of the Code of North Carolina (1883) provides:

CORPORATE POWERS.

ry railroad corporation shall have power:
Holding property.

purchase, hold and use all such real estate and other y as may be necessary for the construction and main- of its railroad and the station and other accommoda- ecessary to accomplish the objects of its incorporation."

Supreme Court of Illinois, continuing, says:

s further argued that the petition fails to show that the d telegraph line will not incommode the public use of road. The allegations of the petition, as already above l to, show that this objection is not well taken. Such ons must be considered in connection with the location elegraph line. The location of the line as indicated in ition, shows that the public use of the railroad will not ously incommoded."

in this connection to call the attention of this honor- urt to the petition filed in this cause, setting out the in which the Telegraph Company proposes to con- ts lines upon the right of way of the railroad, which e apparent to every one, cannot at all incommode its cord, pp. 3, 4, 5 and 6). The Supreme Court of Illi- its said opinion upon this question, says: "These

allegations in the petition are in the nature of stipulations, to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court." *Chicago & Alton R. R. Co.* v. *Joliet, Lockport & Aurora R. R. Co.*, 105 Ill., 388; *Peoria and Pekin R. R. Co.* v. *Peoria and Farmington R. R. Co.*, 105 *Id.*, 140.

Again the court says: "The spaces over which the wires are strung from pole to pole, are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it or injure it, for any other purpose than to erect telegraph poles, and to suspend wires upon them and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires, for the purpose of repairing its lines. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an easement upon what it condemns, for the purpose of entering thereon in order to erect and repair the line." *St. Louis, etc.*, v. *Postal Tel.-Cable Co.*, 173 Ill., 508 (1898).

In which case, that court sustained a judgment for nominal damages, and held that the principle announced in *C. B. & Q.* case, 166 U. S., 220, applied to and should govern that case.

Also the case of *M. & O. Ry. Co.* v. *Postal Telegraph-Cable Co.*, 46 S. W. Rep., 576, where the Supreme Court (Tenn.) sustained a judgment for nominal damages only, and held,

as did the Illinois court, that the principle announced in the Chicago case should and does govern. The court says:

"This is simply a case where the railroad is not using the space occupied by the posts and wires, and when it cannot convey it to another for any purpose, in which case only nominal damages arise." In that case nominal damages only were awarded to the railroad company in a condemnation proceeding by the telegraph company for the right to construct, maintain, and operate its telegraph lines along and upon the right of way of the railroad.

There were two causes at the same time before the court on appeal by the railroad company between the same parties and involving the same question. Under the statute of Tennessee, a separate condemnation proceeding was required by the telegraph company in each circuit court district through which the road runs; hence, there were two causes appealed from two separate circuit court districts, which were heard by the Supreme Court together. The court said: "The causes are before us on appeal by the railroad company, but the real party in interest is the Western Union Telegraph Company, a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has a right under its contract to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other lines upon its right of way.

"It does not acquire any estate in fee. It only acquires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance on each side of its track, it has no right to occupy the way beyond its track, cuts and fills, or to such distance and to such an extent only to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, encumber or use its right of way except as its necessities and conveniences may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes nor to

public purposes, except so far as needful and helpful to the operation of the road itself.

Jones on Easement, Sec. 383.

"Its right of way can therefore have no market value, because it cannot be placed upon the market, either by a private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement, a *quasi* public use.

"But it has been held that the land already taken by the exercise of eminent domain for public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or destructive to the former use."

Mills on Em. Dom., Sec. 45, and cases there cited.

"It is not insisted in this case that the use of the right of way and construction of the telegraph lines will be any detriment or obstruction to the railroad, but, on the contrary, it is shown it would be a benefit and convenience. A telegraph line along a railroad is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance.

"A railroad company may therefore construct a telegraph line along its right of way or permit another to do so, but it acquires and can confer no exclusive right to do so.

"*Western Union Tel. Co.* v. *Balt. & Ohio R. R.*, 19 Fed. Rep., 660.

"*Western Union Tel. Co.* v. *American Union Tel. Co.*, 38 Amer. Rep., 781.

"*Western Union Tel. Co.* v. *B. & O. S. W. R. R.*, 11 Federal Rep., 1.

"*Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 3 Otto., 124.

"*Amer. & Eng. Enc. Law*, Vol. 3, pp. 885–6, 1st ed.

"Under this view of the estate and interest which railroad companies have in their right of way, it is difficult to see how the damages sustained by the road can be anything but nominal.

"It is said with much earnestness and with some degree of plausibility that it would be unjust to allow a telegraph company to plant its poles along the right of way, when the railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of the telegraph line.

"The learned trial judge in the Madison county case held: 'The measure of damages to the defendant is the amount of decrease in value of the use of the right of way for railroad purposes when it is jointly used for telegraph purposes. This rule was no doubt adopted from the rule laid down by the *Supreme Court of the United States in the case of C. B. & Q. R. R.* v. *the City of Chicago*, 166 U. S., 248."

The Supreme Court of Alabama, in the case of *M. & O. Ry. Co.* v. *Postal Telegraph-Cable Co.*, appealed from the Circuit of Mobile county. Mr. Justice Harelson for the court, in that case, said:

"This cause is an appeal from the Circuit Court to review the proceedings of that court in the trial of the cause of appeal from the Probate Court, where they were instituted, for the condemnation of an easement in favor of the appellee company, to construct and operate its line of telegraph over the right of way of appellant company. The case is here on appeal by the railroad company, but the real party in interest, as appears from the proceedings, is the Western Union Telegraph Co., with which the railroads have a contract for an exclusive line over its right of way, and under its contract said telegraph company may use the name of the railroad company to resist the attempt of any other line to construct on the right of way of the railroad any competing telegraph line.

"In the case before us, a very nominal amount of land constituting right of way is proposed to be taken—only that part of it occupied by posts, one hundred and seventy-five feet apart, leaving the way for all other purposes unobstructed. It is really an easement in an easement, a servitude, true, for which the company is entitled to some compensation under the Constitution. The railroad company, however, holds its right of way so far as is made to appear, simply for railroad purposes, and is restricted in its use of same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal. Indeed, if we might weigh advantages and disadvantages, a competing line would naturally and reasonably appear to be an advantage to the railroad company. * * *

"It has not been shown that the company holds the land as a private individual, to devote it to any purposes it pleases, or to sell it at will at the highest price it will bring on the market. The land constituting the right of way really has no market value, so long as it is used for such purposes. It has been withdrawn by the very uses of the company from marketable land; and when there can be no market value of land by reason of its use as a part of an extensive business or enterprise, its value must be determined by the use to which it is applied, and necessarily not by any supposed market value it has. *I. C. R. R. Co.* v. *City of Chicago*, 141 Ill., 500; *C. B. & Q. R. R.* v. *City of Chicago*, 149 Ill., 457; *C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226; *Lewis on Em. Dom.*, sec. 485. Commenting on the decision in the Illinois case last cited, which was a case for the condemnation of a street across railroad tracks or right of way, the Supreme Court of the United States, in the case last cited, used language well adapted to the case in hand. They say: "The land as such was not taken, the railroad company was not prevented from using, and its use for all the purposes for which it was held by the railroad company was interfered with, only so far as its *exclusive* enjoyment for the

purpose of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street.

"The Supreme Court of Illinois well said 'that the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street, such use of a street being exercised jointly with the use of the company for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks caused by the existence and use of the street.' The Supreme Court of Illinois held in that case that the trial court did not err in excluding evidence to show the general salable value of the land constituting the right of way included in the crossing, or its general value for other uses than that to which it was applied. The soundness of this principle was approved by the Federal Court, and it appears to be sustained by reason and authority. 149 Ill., 457; 166 U. S., 249; *Mobile & O. R. R. Co.* v. *Postal Tel. Co.*, Sup. Ct. of Tenn., Apr. term, 1898, in MS.—two cases tried and decided together."

The Supreme Court of Mississippi, in the case of the *Mobile & Ohio R. R.* v. *Postal Telegraph-Cable Co.* (1899), in a similar proceeding, held:

"We adopt the rule as first above stated in *St. Louis & Cairo R. R. Co.* v. *Postal Telegraph-Cable Co*, 173 Ill., at page 534; 51 N. E. Rep.—which announces the rule above quoted by the Supreme Court of Illinois."

The court furthermore says:

"This is undoubtedly the sound view. Mr. Justice Harlan puts the point with great clearness in the same case, at page 258, 166 U. S.: 'Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public—the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their

property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws, unless it be that the public cannot have a street across the tracks of a railroad company, except upon the condition precedent that it shall condemn and acquire the absolute ownership of the land, leaving untouched the right of the company to cross it with its tracks.'

"The doctrine of the *Boom Co.* v. *Patterson*, 98 U. S., 402, has no application to this case. Patterson owned his island absolutely, to be used or sold for any purpose he pleased. His use of it was not limited, as in the use of its right of way by a railroad company.

"The doctrine by Mr. Justice Harlan for the United States Supreme Court above, and of the Supreme Courts of Illinois, of Tennessee, and Alabama, is undoubtedly the only correct view, and, if the case of the *Postal Telegraph-Cable Co.* v. *Alabama & Vicksburg R. R. Co.*, 68 Miss., 314, conflicts with what is here announced, it is, to the extent of such conflict, hereby overruled."

Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co. (May 31st, 1899), 52 S. W. Rep., 106.

In this case the court held:

"1st. That in condemnation proceedings by a telegraph company against a railroad for the right of way of a telegraph line, evidence as to what the right of way was worth to the railroad company, or what it cost to acquire it, or that the company contemplated making other improvements in the future, is inadmissible.

"2d. The measure of damages being the damages caused by the interference of the poles with the use of the right of way, the cost of clearing the grass from the poles, which the

railroad company shall desire to burn off its right of way, is not an item of damage.

"3d. The peculiar advantages that the telegraph company might derive from the use of the right of way is not an item of damages."

Citing *C., B. & Q. Ry. Co.* v. *City of Chicago*, 149 Ill., 457, and *Ibid.*, 166 U. S., 226.

Again, the same court, in the case of *Texas & New Orleans R. R.* v. *Postal Telegraph-Cable Co.* (May 31st, 1899), 52 S. W. Rep., 108, held:

"The measure of damages for the appellant in this case was compensation for the diminution in its right to use its tracks, caused by the use to which the right of way would be put by the telegraph company. *C. B. & Q. R. R. Co.* v. *City of Chicago*, 166 U. S., 581. Under no conceivable state of facts could the value of this right of way to the appellee be made the measure by which to determine the damages sustained by appellant. * * The contention that appellee had deprived appellant of a strip of land at least ten feet in width and sixteen miles long, is not borne out by the record."

Each one of these courts holds that the principle announced by the Supreme Court of the United States in the Chicago case, *supra*, should control and govern proceedings of this kind.

Lewis on Em. Dom., section 462, says: "Just compensation, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use—citing *San Francisco R. R. Co.* v. *Caldwell*, 31 Col., 367; *Alton & Sangomon R. R. Co.* v. *Carpenter*, 14 Ill., 190; *McIntyre* v. *State*, 5th Blackf., 384; *Sater* v. *Burlington & Mt. Pleasant Plank Road Co.*, 1 Ia., 386; *Bangor & Piscataquis R. R. Co.* v. *McCowle*, 60 Me., 290; *Winona & St. Peter R. R. Co.* v. *Denman*, 10 Minn., 357; *Lymons & Cincinnati*, 14 Ohio, 147; *Livingston* v. *New York*, 8 Wend., 85; *Bigelow* v. *West Wis. R. Y. Co.*, 27 Wis., 478; *Chesapeake & Ohio Canal Co.* v. *Key*, 3 Crouch, C. C., 599.

Therefore, nominal damages is just compensation in such cases, for the railroad company is entitled to only nominal damages, for the reason that it sustains no loss by reason of the construction of a telegraph line in the manner set out in the petition; and the Supreme Court of Illinois, in the Chicago case, *supra*, says: "These allegations in the petition are in the nature of stipulations to which the petitioner binds itself. Such stipulations have been held valid by the decisions of this court"—citing *Chicago & Alton R. R. Co.* v. *Joliet, Lockport & Aurora R. R. Co.*, 105 Ills., 388; *Peoria & Pekin Union R. R. Co.* v. *Peoria & Farmington R. R. Co.*, 105 Ills., 110.

"A telegraph line constructed upon the right of way of a railroad is no material interference with its use for railroad purposes." *Lewis on Eminent Domain*, sec. 269; citing *N. W. R. R. Co.* v. *Southern & Atlantic Tel. Co.*, 53 Ala., 211; *West. Union Tel. Co.* v. *American Union Tel. Co.*, 65 Ga., 160; *Balto. & Ohio Tel. Co.* v. *Morgans L. & T. Ry. Co.*, 37 La. Ann., 883.

Since the delivery by Justice Harlan of the opinion of the Supreme Court of the United States in the Chicago case, *supra*, 126 U. S., 226, every court that has had occasion to pass upon the measure of damages to which a railroad company is entitled when a portion of its right of way is taken for the use of a telegraph line, has held that the principles announced in the case of *Patterson* v. *Boom Co.*, 98 U. S., do not apply, because in that case the proceeding was against Patterson, an individual, and he was entitled to the value of his land taken for the public use, for any and all purposes for which it was best adapted. That opinion is not in conflict with the principles announced in the Chicago case, *supra*, but upon the contrary, it is quoted approvingly by the learned judge delivering that opinion.

Long before the cases above cited in 149 Ills. and 166 U. S. were decided, the Supreme Court of Illinois, in 1882, in the case of *Lockey* v. *Mutual Tel. Co.*, 103 Ills., 433, said:

"What does the telegraph company acquire by the judg-

ent of condemnation? It surely was not intended that it ould be the fee of the land condemned [in this case the de- ndant in error expressly states that it does not seek the fee. cord, p. 5, last paragraph.] The company cannot cultivate take exclusive possession of it and enjoy it for any other rpose than to erect poles and suspend wires upon them, and aintain and repair the same, and to use the superstructure telegraph purposes. This is all the petitioner asks, and the tute authorizes it. By designating the width of the strip the condemnation proceedings, the company acquires no ht to exclude the owner of the soil from the use of the land. at remains as it was before, except that the company has quired an easement in the strip condemned, for the purpose erecting its line. The only exclusive right of occupancy quired by such proceeding is to the ground occupied by the es erected for telegraph purposes. These are the rights in- ded to be conferred by law, and all that would or can be nferred under it, and the judgment in this case confers no re."

This case never has been overruled, and never will be, be- se it is predicted upon sound reason, and the law is but the fection of reason.

The same principle is announced by the Court of Queen's nch in the case of *Stebbing* v. *Met. Board of Works* (Court of B., Vol. 6, p. 40). In this case the church-yard had been sed under statutory authority, and the Metropolitan Board Works had acquired by statute the power to take it. The ntiff claimed compensation under the Land Clause Act, the court said: "Owing to the nature of the land, the tor never could have alienated it; he might perhaps have ained an act of parliament permitting the use of a part of r some purpose of a *quasi* secular nature, but he never ld have been allowed to use it in any way for a secular pose, with a view to his own interest. It was therefore, in hands, practically useless. When the Metropolitan Board Works are enabled to acquire it for a public purpose, why

should he be benefited? He can have no claim to have a new value attached to that which was before valueless, simply because the legislature has stated it shall be transferred from one public purpose to another. There is nothing to be found in the act to support the plaintiff's contention, nor is it founded on reason. It is argued for plaintiff that, although in his hands, the church-yards are valueless, yet when they pass to the defendant under the compulsory act of Parliament they acquire a value from the fact that they are applied to secular purposes. I do not think that it is applicable to the present case. When Parliament gives compulsory power and provides that compensation shall be made to a person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; that this loss shall be decided by what was the value of the thing to him, and not what would be the value of it to the person acquiring it. The plaintiff, as Rector, could never have parted with these church-yards; therefore, to him they were perfectly valueless."

In the case of *Railroad Co.* v. *Catholic Priest*, 119 Ills., 529, the court said:

"Where the owner of land is restricted by statute, or by the provisions of an instrument under which he holds his title or any other binding order, to a particular use of it, so that he can not lawfully apply it to any other use, the measure of his compensation where his land is taken by condemnation, will be its value to him for the special use to which he is so restricted."

Such is the principle laid down in the case of *Alcott* v. *Burr*, 10 C. B., 327; *Allen* v. *Boston*, 137 Mass., 319; 11 Wend., 1149. The last named case was reported in the year 1834. Hence these are not new principles. They are old principles which are applicable to the state of facts in this case.

In this connection I beg to call the attention of the court to the case of *People* v. *N. Y. Cent. &c. Ry. Co.*, 156 N. Y., 570,

ch shows that in New York for many years a statute has ted to the effect that a city may lay out a street across a oad track, without paying any damages whatever, and such a statute is constitutional.

lso to *Cook on Corporations*, Sec. 934, p. 2230, 3rd vol., re the learned author says:

Where a telegraph company has a right, under the stat- of a state, to condemn a right of way on the right of way railroad, the damages to be paid to the railroad company nominal, inasmuch as the railroad company owns only a t of way, and such right of way is not interfered with by telegraph company," citing the cases hereinbefore cited, ch he, of course, regards as setling the law upon the sure of damages to which the railroad company is entitled the telegraph company, in a proceeding of this kind.

herefore, I respectfully submit, that the railroad company titled only to nominal damages from the telegraph com- *, and that it is a matter of law, to be passed upon by the* , as was done upon the trial of the case of the *City of go* v. *the Chicago, Burlington & Quincy R. R. and others*, by Circuit Court of Cooke county, Illinois, which ruling was ined, as I have hereinbefore shown, by the Supreme Court linois, 149 Ills., 457, and 166 U. S., 249; the principle in h has been held, as I have hereinbefore shown, by all the ts that have had occasion to pass upon the matter since to apply to cases of this kind.

ilroad and telegraph companies are both public improve- s—both are entitled to exercise the right of eminent do- as agents of the State, upon the theory that, the public e benefited thereby; and a telegraph company is au- zed to go upon the right of way of a railroad company the theory that it was acquired and is held for the public —for the purpose of operating its trains in the carrying ight and passengers; and the telegraph company will messsages, dispatches, and news along its wires, for the

public good; and if this second public use does not interfere with the purposes for which the railroad right of way was first taken and appropriated, then the railroad (an artificial being, created and permitted to have its existence by the grace of a beneficent law) cannot be heard to complain when, under the same law it is required to share so much of its right of way, so obtained, held, and used, with another child of the law. They are joint-heirs of the law—the breath of life being blown into them by the law, for the public good; and all the rights, franchises, and privileges granted them by the law, are given them for the benefit of the public. Hence the arrogant and defiant air and strut of the railroad company illy becomes it.

From the authorities above quoted, it is manifest that the measure of damages to which the railroad company is entitled from a telegraph company in these proceedings is merely nominal. That is a question of law and not of fact, and hence it was error in the Circuit Court to refuse to remand the cause, for this court has no jurisdiction.

There is no error upon the face of the record upon which the plaintiff in error can complain. I will argue that question upon the merits of the case.

Brief Upon Merits.

The errors complained of by the plaintiff in error in its assignment of errors, are to the ruling of the Circuit Court in overruling its motion to dismiss the petition of the defendant in error, filed in the State Court of North Carolina, for the reasons stated in the motion (16 grounds) designated by the court as a demurrer, and dated August 31, 1898 (p. 24 of record); the order of the court directing the clerk to appoint commissioners, dated September 15, 1898 (p. 36 of record); and order of October 24, 1898, sustaining the demurrer of plaintiff in error to the answer of the defendant in error, and refusing leave to plaintiff in error to introduce testimony to sustain the averments of said answer (record, pp.

and the orders of the clerk of the court at Greens
lated September 19, 1898 (p. 36 of record), and October
98 (p. 59 of record). The Circuit Court, in the opinion
ling the demurrer to petition of defendant in error, I re-
ly submit, fully and completely sustains the ruling of
rt in the order of August 31, 1898. In his opinion, p.
he record, His Honor says: "The motion is in effect a
er, and to sustain it, sets out in full 16 grounds of
er. These embrace three general propositions:

hat there is now no law in the State of North Carolina
ng for the condemnation of lands or right of way for
of telegraph companies;

hat if there be such a law in North Carolina, the peti-
the telegraph company in this case has not followed it
tial particulars;

hat the petition is vague and uncertain, in not stating
l by what tenure the lands owned by the railroad com-
e held, and whether only as an easement or in fee.

leave to substitute so much of the opinion of the dis-
ed and learned jurist upon those three propositions, as
ument upon that assignment of error. He properly
the many grounds set forth in the paper into three
heads, and then answers them *seriatim*.

pinion of court, pp. 26 to 33 inclusive, of record.

lition to the reasons given by the learned judge in his
why the petition of the defendant in error should not
n dismissed, I beg to say: Section 1944 of the Code
Carolina of 1883 was, as is shown in the brief of
or appellant, amended by act of 1893, by striking out
the word "that" in the sixteenth line to the word
cted" in the twenty-fourth line of said section. The
tricken out is as follows:

the company has surveyed the line or route of its
road, and made a map or survey thereof, by which
e or line is designated, and that they have located

their said road according to such survey, and filed certificate of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which the said road is to be constructed."

Of course, it having been stricken out, repealed by the act of 1893, it was not incumbent upon the defendant in error to have followed the provisions of a statute repealed.

Section 1952 of the Code was also repealed by act of 1893, as shown by the brief of counsel for appellant, and in its stead the following was substituted:

"That whenever it shall become necessary to condemn any land for the purposes of a *railroad*, that at the time the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depths of the cuts and heights of the embankments on the land so sought to be condemned, and at what points on such land so sought to be condemned, and at what points on such land such cuts and embankments are located."

Section 1946 was also amended by act of 1891, as shown by brief of counsel for appellant, by striking out all after the word "them," in the 21st line of said section, to and including the word "railroad," in the 25th line thereof. The part so stricken out read as follows:

"And in determining the amount of such compensation, they shall not make an allowance or deduction on account of any real or supposed profits which the parties in interest may derive from the construction of the proposed railroad." And substituted in lieu thereof the following:

"Provided, however, that in case the benefits to the land, caused by the erection of said railroad, be ascertained to exceed the damages to such land, then said railroad company shall pay the costs of the proceedings and shall not have a judgment for the excess of benefits over the damages."

It is insisted by the very ingenious counsel for plaintiff in error that the defendant in error is not entitled to and cannot avail itself of the provisions of the amendatory act of 1891, above quoted, for the reason that section 2012 provides that the proceedings for condemnation on the part of a telegraph company, &c., "shall be as prescribed in this chapter for condemning lands to the use of railroads;" and inasmuch as it was not therein provided that it shall be as prescribed in this chapter "*and any amendments made thereto*" for condemning lands to the use of railroads, that under the construction of statutes as given by the courts, the defendant in error cannot avail itself of the amendment of 1891.

I respectfully submit, if that be true then all the labor expended by the learned counsel in trying to persuade the courts that the defendant in error should have done the vain thing of filing a map showing the line of the telegraph company as located on the land sought to be condemned, and a profile showing the depth of the cuts and heights of the embankments on the land so sought to be condemned, &c., is as futile as such map would be unnecessary in a proceeding of this kind; for so much of Section 1944 requiring a survey and map to be made, as I have before shown, and as they show, was entirely repealed by the act of 1893; and Section 1952, requiring maps to be made, &c., was also repealed subsequent to the enactment of Section 2012 of the Code; and the statute enacted in lieu thereof, requiring a map and profile, &c., was also enacted subsequent to the adoption of the Code; and therefore, if for no other reason, their own arguments show that they do not and can not apply to the telegraph company in this proceeding.

Conceding that their argument is sound upon the statutory construction above, and that so much of Section 1946, providing as follows: "And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed rail-

road," was repealed by the act of 1891; and in lieu thereof the following was substituted: "Provided, however, that in case the benefits to the land, caused by the erection of such railroad, be ascertained to exceed the damages to said land, then said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages"—of which the defendant in error can not avail itself; still, as said by his Honor Judge Simonton in his opinion, there is sufficient left in the section unrepealed, providing for the assessment of just compensation to the plaintiff in error. That section provides as follows:

"They (the Commissioners) shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them, all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them."

Do what? "Shall ascertain and determine the compensation which ought justly to be paid by the company to the party or parties owning or interested in the real estate appraised by them." If that is not within itself complete, full and perfect authority for ascertaining just compensation to the plaintiff in error, I have never yet seen a statute authorizing the exercise of the right of eminent domain, that was. The truth is that the substituted statute of 1891 is of questionable constitutional authority, for it authorizes the commissioners, in assessing damages, to take into consideration the benefits that would accrue to the land owner by reason of the construction of a public work, and to offset the damages to which he is entitled for the taking of his property by such supposed benefits. Many courts have held that that is in violation of

the constitutional provision, "that private property shall not be taken for public use until just compensation is first paid therefor." So there is nothing in all that, for the defendant in error can't be prejudiced by it.

The petition of the telegraph company (defendant in error), as stated by the learned Circuit Court Judge in his opinion, follows closely, as much as it is possible to do, the provisions of section 2010 of the Code. But they object to the petition because it provides that the telegraph line shall be constructed within four feet of the outer edge of the railroad right of way, or at such other points thereon as may be designated by the railroad company; and in the event the railroad company should require or need any portion of the land occupied by the telegraph company that the telegraph company would move the poles to such other points thereon as may be designated by the railroad company. What right the plaintiff has to complain of that exceedingly fair proposition I am unable to perceive, for, surely it can't be prejudiced by it.

The plaintiff in error furthermore complains that the court erred in sustaining the demurrer of the defendant in error, to its answer, and refusing leave to it to introduce proof sustaining the averments of its answer. The answer is but a rehash of the demurrer or motion which was overruled by the court, with the following additional averments of facts:

Paragraph 7, pp. 48–9. "The complainant's petition states that said poles will be so erected and said telegraph line so constructed and maintained, as not to obstruct the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way; but this defendant denies the truth of said statement and declares that said poles erected, and said telegraph line constructed, and maintained as set out in detail in said petition, will obstruct and hinder the usual travel and business of this defendant, and will interfere with the operations of defendant's said railroad; and with the telegraph line now constructed upon this defendant's pro-

perty; and this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon its property, as set out in said petition, in such manner as not to obstruct or hinder the usual travel upon defendant's railroad."

Again, paragraph 11, p. 60: "Further answering, defendant denies 'that the right of way of this defendant is about 100 feet wide, and that it entends about 50 feet from a line along the centre between the rails of said main track.' On the contrary, defendant states that the strip of land along which its tracks are laid, and trains run, varies greatly in width at different points along its line, and at sundry points along said line included in and covered by the condemnation proceedings of the plaintiff, it is much less than 100 feet in width; indeed, it is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or at least would grossly imperil the safe operation of said defendant's railroad, and grossly obstruct and hinder the usual travel thereon."

Again, paragraph 12, pp. 51–52 of record, plaintiff in error says: "Said petitioning company makes the following statement, that said defendant railroad company is duly incorporated and doing business under and by virtue of its charter, with a right of way of 100 feet in width, obtained by an enactment of the General Assembly of this State for railroad purposes alone.

"Defendant submits that said allegation is indefinite, uncertain and obscure as to the statement that the right of way of this defendant is 100 feet in width. Defendant repeats the denial of the statement which the defendant made in answer to a similar allegation in said petition. If said allegation means, or is intended to convey the meaning, that the charter of this defendant was obtained by enactment of the General Assembly of North Carolina, then said defendant denies this statement. On the contrary, defendant says that its charter was obtained by an enactment of the General Assembly of

Virginia. But if said allegation means, or is intended to convey the meaning, that the right of way of this defendant was obtained by an enactment of the General Assembly of the State of North Carolina, then this defendant denies the truth of this statement also, inasmuch as is above set forth, much of the property of this defendant, and the strip of land on which its track is laid and its trains run through the several counties specified in the petition of the telegraph company, is held by this company under a fee simple title derived by deeds of purchase from the original owners of said land."

And again, paragraph 12, p. 51 of the record: "Said petition of the telegraph company contains the following allegation: 'Said telegraph lines when constructed will in no way damage the property of said railroad company, nor impair or diminish the value of said right of way for railroad purposes; but that the same will be beneficial to said railroad company and its patrons.' Defendant is advised that said allegation is rather a conclusion of law than a statement of facts, but whichever it may be, defendant meets that allegation with a denial of its truth as a statement of fact, and its soundness as a conclusion of law."

The above extracts from the answer, to which a demurrer was sustained, are all of the allegations of fact in said answer. All the balance of the answer set up matters of law entirely, and the only allegations of fact in said answer are those above quoted. I respectfully submit that as to them the court was right in refusing to allow the plaintiff in error to introduce evidence in their support, because the first allegation of fact was a denial (in paragraph 7 of the answer, pp. 48-9) of so much of the petition of the defendant in error that its poles would be erected and line constructed and maintained, so as not to obstruct the usual travel and business of said railroad, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed upon said right

of way. The defendant in error denies that averment in the petition, and states affirmatively as follows:

"And this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon this property, as set out in said petition, in such a manner as not to obstruct or hinder the usual travel upon the defendant's said railroad."

The statute of North Carolina, section 2007, is: "Any telegraph company chartered or incorporated by this or any other State, shall have the right to construct, maintain, and operate lines of telegraph along any railroad or public highway in the State of North Carolina; *but*, such lines of telegraph shall be constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway." Here the undisputed right is by statute given to any telegraph company chartered or incorporated by the State of North Carolina, or any other State, to construct, maintain and operate its lines along any railway in the State, upon one condition only, and that is, that such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad.

The petition uses the very language of the statute, saying that the telegraph line will be so constructed and maintained "as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said trains, or with any other telegraph line now constructed on said right of way." It was wholly unnecessary for the telegraph company to have averred in its petition that it would not interfere with any other telegraph line. In fact, it was wholly unnecessary for it to have averred that it would construct its lines so as not to obstruct or hinder the usual travel and business of said railroad. *All that was necessary for it to have averred in its petition was that it was incorporated, stating where it was incorporated; that it had been unable to secure by contract or agreement the right to construct its line*

such right of way, and that it had given security for costs. se are the jurisdictional facts under the statute necessary to have averred. (Sec. 2010.) Any other facts were not necessary have been averred, and, therefore, issue upon them is aterial.

ut plaintiff in error asserts in answer "that it will not ossible to construct or maintain a telegraph line upon its erty, as set out in said petition, in such a manner as not to ruct or hinder the usual travel upon defendant's said rail- ." In other words, by their answer and proof, it permit- to make it, they would thwart the express purpose and will e Legislature. There is but one limitation attached to the demnation of so much of the right of a railroad company for se of a telegraph company, and that is, *that just compensation be paid for it.* It is the duty of the court to see to that. ct, were the telegraph company to undertake to construct nes upon the right of way without paying just compensa- , it would be a trespasser.

the case of *California Ry. Co.* v. *Cooper*, 76 Calf., 404, the t uses the following language:

While a corporation which brings such an action is the er party to bring it, because the statute makes it the pro- party, its interest in the action is but incidental and subor- ted in the main purpose (which alone justifies the pro- ing under the Constitution), the main question being to re private property upon just compensation for the public In initiating the proceedings the corporation acts as an t of the State, the Legislature having provided the mode e employment of the power of eminent domain. * * * agency is in the nature of an office; the corporation is a tee prosecuting the proceedings primarily for the State, h by its Legislature has declared the use to be public."

nd in the case of *Lake Shore & Michigan S. R. R. Co.* v. *ago & Western Indiana R. R. Co.*, 97 Ill., 506, the court :

"To warrant the taking of property by one party, already appropriated to a public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change from the present use shall be for the benefit of the public. Whether the new use be different from the present one is a judicial question for the courts to decide, and where such new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question, to be determined by the law-making power.

"This is a case where the plaintiff in error filed an appeal in the Superior Court of Cook county, Illinois, in chancery, against the defendant in error, seeking to enjoin the further prosecution by the defendant of certain proceedings pending in the County Court of Cook county, to which the plaintiffs in error were made parties defendant. The appellee alleged that 'if the road of the defendant be constructed as proposed and operated, the business thereby conducted over these premises will be almost doubled; that such increase will so hinder and embarrass defendant in transferring freight and running trains as to cause an injury constantly increasing, and not susceptible of compensation by damages in a case at law, and would impair, infringe and destroy the franchise of complainant.'

"The appellee also charges that the construction and operation of defendant's road, as proposed, would under the circumstances necessarily be a nuisance of a serious and irreparable nature, in the delay to business and increased dangers to life. The relief sought is a perpetual injunction forbidding the condemnation proceedings and the construction of any road over the premises and the taking possession of any part of the premises. * * * The right to exercise the power of taking property for public use is one of the recognized powers of sovereignty, and is one of the attributes inherent in the States. The power to declare under what circumstances that right may be exercised, and to provide the mode of its exercise, was conferred upon the General Assembly by that clause which

l in that body (the legislature) power of the State. That
· is not granted, but is merely recognized as one of the
utes of a State. The authority expressly given such cor-
ons to cross and intersect intervening railroads at any
on its route is by necessary implication a declaration that
bordination of the premises already occupied by a rail-
to the use of another railroad for a crossing, is a change
use which the public good demands in all cases where
w company can afford to pay full compensation therefor;
nless it be the law, that upon failure to agree in that re-
the company thus crossing is to select the point of cross-
nd prescribe the manner of crossing, as the basis for the
priate compensation to be paid therefor, no new railroad,
our law, can lawfully locate its road upon any route
ver involving the crossing of any intervening railroad,
nt the consent of the owners of such railroad. The
al Assembly certainly never intended to bring about
a result. If the law be otherwise, the passage of the
al Railroad Act was an idle ceremony. * * * By
ssage of these two statutes, the General Assembly hav-
uthorized appellee to select its own route, and to cross
tervening railroad at any point upon its route, and to
mn the right of way across such premises, and having
n substance declared that such condemnation is for a
use, and this being, as already stated, a political ques-
hich the General Assembly has the sole power to deter-
the courts have no power to review this determination."
injunction in this case was refused.

sist, therefore, under that authority and the Act of Con-
&c., that any testimony offered by the plaintiff in error
ve the allegations of the seventh paragraph of its answer,
have been wholly irrelevant and incompetent, and there-
nadmissible, because the effect, if such testimony were
uced, would be to have the courts declare that the Acts
Legislature and of Congress, in the language of the
"was an idle ceremony."

5

Act of Congress, entitled, "An Act to Aid in the Construc-struction of Telegraph Lines, and to Secure to the Government the use of the same for postal, military, and other purposes, approved July 24,1886." Rev. St., Sec. 5263 and Sec. 3964.

Under Sec. 5263 it is provided that "any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may be hereafter declared such by act of Congress, and over, under, and across the navigable streams or waters of the United States; provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Sec. 3964 provides as follows:

"The following are established post roads. * * * All railroads or parts of railroads which are now, or hereafter may be, in operation."

I insist, therefore, under the above cited authorities and acts of Congress, that any testimony offered by the plaintiff in error to the allegations of the seventh paragraph of its answer would have been wholly irrelevant and incompetent, and therefore inadmissible, because the effect would be to render the statutes, both State and Federal, in the language of the court above cited, "an idle ceremony."

The Supreme Court of Louisiana, in the case of *Postal Telegraph-Cable Co.* v. *M. L. & T. R. R. Co.*, 49 La. Ann., 58, 21, S. E. Rep., 183, held that the Louisiana statute authorizing proceedings of this kind was auxiliary to the acts of Congress above cited.

In the case of *C. R. I. & P. R. R. Co.* v. *Town of Lake, et als*, 71 Ills., 336, the court says:

he power to determine in any case whether it is needful
rcise the power of eminent domain, must rest with the
tself, and the question is always one of strict political
:ter, not requiring *any hearing upon the facts, or any*
l determination. (Cooley, on Constitutional Limitation,
In the case of *Swann* v. *Williams*, 2nd Mich., 327, in dis-
g that question it is well said by the court: 'The power
e government, respecting public improvement, is sove-
power; it rests within the purview of the legislature to
nine when and in what manner the public interest re-
the exercise, and with the reason for the exercise of that
tion the court will not interfere. * * * As we un-
nd the argument of appellees, they claim that they, as a
ration, have under the laws of eminent domain, taken
old this property for public use and purposes, and when
pellees undertake to invoke the same law, and take the
rty for public services, they (the appellees) have a supe-
quity, and hence the courts ought and should interfere.'
'e do not regard the position taken by appellees as sound
able. We cannot believe the right of property more
in a chartered corporation than the same right in the
f a private citizen—both must stand on the same foot-

is impossible upon principle to make a distinction be-
rights to land acquired by a corporation, and letters
obtained by a citizen from the government. Over each,
me sovereign power exists. The same great law of pub-
cessity, requiring that private rights should yield to
exigencies, must be applied to both. The citizens and
rporation alike accept a grant of land with the reserved
esting over and upon it of the State to retake it at such
as the public necessity may require, upon just compen-
being made. * *
he whole policy of this country in relation to public
ays, railroads and canals, under which lands have been
nned, rests upon this power. * * The doctrine con-

ended for would have a tendency to stop the improvement and development of the country."

In the case of *Richmond R. R. Co.* v. *Louisa R. R. Co.*, 13 How., 71, the court said:

"The grant of a franchise is of no higher order, and confers no more sacred power, than a grant to an individual, and when the public necessities requires it, the one as well as the other may be taken for public purposes, on making suitable compensation."

In *West River Bridge Co.* v. *Dix and others*, 6 How., 507, the court said:

" * * A distinction has been attempted in argument between the power of the government to appropriate for public uses the property which is corporate, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason"—citing *Austin Water Power Co.* v. *Boston & Worcester R. R. Co.*, 23 Pick., 389.

In 73 Mich., 953, the court says: "The legislature may appropriate property under the power of eminent domain, by an act specifying the property acquired and the use to which it is to be devoted. (*Boom Co.* v. *Patterson*, 98 U. S., 403; *Lewis on Eminent Domain*, Sec. 442.) And when it has declared the necessity for taking certain property by regular enactment, such an act must be held to be for this purpose, the law of the land, and no further finding or adjudication can be essential unless the constitution of the state expressly so provides; or it may declare the purpose for which the property is to be taken and leave the selection of the property to be taken to whatever agencies it pleases, for it has the sole power to judge what persons, corporations or other agencies may be properly clothed with this power, subject only to the limitations imposed by the constitution."

Statutory Provision, a Condition Subsequent.

ondition mentioned in Section 2007 of the Code of arolina, namely, "But such lines of telegraph shall be ucted and maintained as not to obstruct or hinder the vel on such railroad or other highway," is a condi- *equent*, like that in a deed to a railroad company of depot or warehouse purposes, conditioned that the makes such improvements on the land. Of course the could not make the improvements until it got posses- he land. Neither could the telegraph company con- lines until it had secured the right of way, by con- greement, or until after condemnation proceedings. truction of the lines in the manner set out in the Code, h a condition subsequent as that of the construction road company of the improvement specified in the ich are the considerations of the deed. The telegraph having secured the right, by condemnation proceed- construct its line upon the right of way of the rail- *t* construct it so as not to obstruct or hinder the el on the railroad or other highway. If it does, it joined. If the railroad company suffers extraordi- ages by the unskilled construction of the line, it can a special action for damages against the telegraph

The answer does not allege insolvency of the telegraph

answer by the defendant was authorized, it was by Section 1945 of the Code, which provides: "The l hear the proof and the allegations of the party, and cient cause is shown against granting the prayer of on, it shall make an order for the appointment of ners." I contend that this section does not apply to aph law as embraced in Section 2007, *et seq.*, but ne to the condemnation by a railroad company of of individuals as provided for in Section 1944, which vs:

"For the purpose of acquiring such title, the said company, or the owners of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal, to the Superior Court of the county in which the real estate described in the petition is situated; such petition shall be signed and verified according to the rules and practice of such court, and if filed by the company it must contain a description of the real estate which the company seeks to acquire, and it must in effect state that the company is duly incorporated, and that it is the intention of the company in good faith to construct and finish the railroad from and to the places named for that purpose in its article of association or in its charter; that the whole capital stock of the company has been in good faith subscribed as required by this chapter, and by the terms of the charter; that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which said route or line is designated, and that they have located the said road according to such survey, and filed such certificate of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which said road is to be constructed. (All that portion providing for a survey and map, and certificate of the directors of the company, was repealed by the act of 1893.) That the land described in the petition is required for the purpose of constructing and operating the proposed road; and that the company has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the company or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estate or interest in said real estate; and if any such persons are infants, their ages, or as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind, or are insane, that fact must be stated, together with such other allegations and statements of liens or incumbrances on such

real estate as the company or the owner may see fit to make. A copy of such petition, with a notice of the time and place when and where the same shall be heard by the Superior Court, must be served on all persons whose interests are to be affected by the proceeding, at least ten days prior to the hearing of the same by the said court."

Under the provisions of that section the railroad company was required to present a petition *praying* for the appointment of commissioners of appraisal, to the Superior Court of the county in which the real estate described in said petition is situated.

Such petition should be signed and verified according to the rules and practice of said court, and if filed by the company it must contain (1) a *description of the real estate*; (2) state that the company is duly incorporated; (3) that it is the intention of the company in good faith to construct and finish the railroad from and to the places named for that purpose in its articles of association or in its charter; (4) that the whole capital stock of the company has been in good faith subscribed (omitting that portion which has been repealed); (5) that the land described in the petition is required for the construction and operation of the proposed road; (6) that the company has not been able to acquire title thereto; (7) the reason of such inability; (8) must state the names and places of residence of the parties, so far as the same can by reasonable diligence be obtained; (9) if infants their ages, or as near as may be, must be stated; (10) if idiots or persons of unsound mind, or unknown, that fact must be stated; (11) together with such other allegations or statements of liens or incumbrances on such real estate as the company or owner of said real estate may see fit to make.

All these distinct averments must be made in the petition by a *Railroad Company* condemning the lands of individuals for its use.

Section 1945, provides: On presenting such petition to the Superior Court, as aforesaid, with proof of service of a copy therefor, and notice as aforesaid, all or any of the persons

whose estates or interests are to be affected by the proceeding, may answer such proceeding and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court may hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place of the first meeting of the commissioners."

I insist that section 1945 providing for an answer applies to the petition of a Railroad Company, and not that of a Telegraph Company. Because section 2010 requires only one averment while section 1944 requires eleven to be made by a railroad company and each is a jurisdictional fact.

If, however, the court should hold that that provision applies to the proceedings on the part of a telegraph company, then we go back to section 2010 to see what necessary averments must be made by the telegraph company in its petition, and there we find that the telegraph company, in the event it fails on application to secure, by contract or agreement, such right of way for the purposes aforesaid over the lands, privileges or easements of another person or corporation, it shall be lawful for it, first giving security for costs, "to file its petition before the Superior Court for the county in which such lands are situate, or into or through which such easement, privilege or franchise extends, *setting forth and describing the parcels of land, privilege or easement over which the right of way, privilege or right of use is claimed; the owners of the lands, easement or privilege, and their places of residence, if known, and if not known that fact shall be stated; and such petition shall set forth the use, easement or privilege, or other right claimed, and must be sworn to.*"

Necessary Averments in a Petition of a Telegraph Company.

Now, mark you, under this section, which is the chart and

compass by which the telegraph company must be guided its petition, the following facts only need be stated, to-wit: "setting forth and describing the parcel of land, privilege or easement over which the way, privileges or right of use is claimed; the owners of the land, easement or privilege, and their places of residence, if known; and if not known that fact shall be stated; and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to." And providing further, "if the use or right sought, be over or upon an easement or right of way, it shall be sufficient, to give jurisdiction, if the person or corporation owning the easement or right of way be made a party defendant, provided that only the interest of such parties as are brought before the court shall be condemned in any such proceeding; and if the right claimed be through or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be determined in one county into or through which such easement or right of way extends."

Now, let us simmer down the necessary jurisdictional facts provided for in that section, to be stated in the petition; and it embraces only the following: "And such petition shall set forth the use, easement, privileges or other right claimed, and must be sworn to." That is all. Any other averments or allegations in the petition are wholly unnecessary and immaterial, and any others made in the petition, being immaterial, no issue could be taken upon them, and no proof was necessary or admissible by the court to establish the contrary. Therefore, the court did not err in refusing to permit the plaintiff in error to introduce proof to sustain its allegations.

Besides that, it is a fact that the court will take judicial knowledge of, that the construction of a telegraph line in the manner set out in the petition of the defendant in error, would not "obstruct or hinder the usual travel on such railroad," no more than a pedestrian upon a side-walk of a city would obstruct the running of a street car.

In New York, the court has taken judicial notice of the fact that banking hours are from 10 A. M. to 3 P. M. (115 N. Y., 250); that city lots in New York city have a certain depth, and that buildings on corner lots often cover the whole lot (85 Hun., 217); that a certain town is in a certain county (131 N. Y., 617); that a trolley car can be stopped in less than 100 ft. (31 N. Y., Supp., 441); that streets in New York city run in a certain direction, and begin and end in a certain place (27 N. Y., Supp., 304); that the pole and front wheels of a wagon may turn at right angles to the wagon (41 N. Y., Supp., 152.)

The Supreme Court of Alabama, in the recent case wherein the Mobile & Ohio Railroad Company was appellant, and the Postal Telegraph-Cable Company defendant, hereinbefore cited, used the following language:

"It is averred in the petition that the proposed line of telegraph will be constructed in the manner (fully stated) so as to prevent any possible interference with any work or use of said railroad. It is proposed to so construct the line that it will not produce any material interference with the free exercise of the franchise of the railroad company, nor extend to that part of the right of way which is in actual use. *Common knowledge teaches that there is ample space on the hundred feet of the railroads right of way for two or more telegraph lines, without obstructing the free and ample use of it for railroad purposes.*"

The opinion in that case furthermore is: "The remaining grounds of the demurrer, 5, 6, 7, 8 and 9, are that there is no sufficient description given in the petition, of the right of way proposed to be condemned. These grounds contradict the very full and definite allegations of the petition. It is difficult to conceive how ampler and freer averments of what is proposed to be done by petitioner in establishing its lines, could have been made. The defendant, on these averments, as it was furnished with sufficient data to do so, entered into a minute calculation by its witnesses, of the number of feet of land that would be occupied by petitioner, in the erection of its poles throughout the whole length of the line, the exact spots

where the poles would be placed, and whether on the one side or the other of the railroad: where the necessities and conveniences of the railroad would be best subserved, could not, of course, be distinctly stated, nor was it necessary to do so. The same objection was raised against a similar petition, in the case of *N. O. & T. R. R. Co.* v. *S. & A. T. Co.*, 53 Ala., 211, and was held not to be well founded. It would seem after this that there was no ground for complaint, for want of information as to what part, and how much of defendant's right of way would be necessary for the establishment of the line of the telegraph company. * * * The plaintiff in its petition proposed a condemnation for its use, such as would not obstruct or hinder the railroad company in its business, or in its use of such right of way: that it would erect its poles 26 feet long above the ground, at a distance not less than 30 feet from the outer edge of said railroad track, and in the event said company should at any time desire to change the locality of its track or construct new tracks or side-tracks, plaintiff would remove its poles at its own expense to any other point on the right of way as might be agreed upon between plaintiff and defendant railway."

The Supreme Court of the State of Tennessee, in a case between the same parties above referred to, uses the following language:

"A telegraph line along a railroad line is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance.

"A railroad company may, therefore, construct a telegraph line along its right of way, or permit another to do so, but it acquires and can confer no exclusive right to do so." *West. Union Tel. Co.* v. *Baltimore*, 19 Fed. Rep., 660: *Id.* v. *Am. Union Tel. Co.*, 38 Am. Rep., 781: *Id.* v. *Baltimore & S. W. R. R.*, 2 Fed. Rep., 1: *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 3 Otto., 24: *Am. & Eng. Ency. Law*, vol. 3, 886, 1st ed. Under this view of the estate and interest which the railroad company

has in its right of way, it is difficult to see how the damage sustained by the road can be anything but nominal. * * * This is simply a case where the railroad is not using the space occupied by the posts and under the wires, and which it cannot convey to another for any purpose, in which case only nominal damages arise.

"It is said with much earnestness, and some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along a right of way, when the railroad company had expended thousands of dollars to keep it free from obstructions, and yet pay nothing for the privilege; but this view is more specious than sound, for a railroad company must incur the expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not; and there is no greater burden or expense because of the presence of the telegraph line."

In a case between the same parties, the Supreme Court of Illinois, 173 Ills., p. 508, says:

"Third: Motion was made to dismiss the petition and the point was raised in the trial that the appellee's amended petition does not contain a sufficient description of the property sought to be appropriated, nor the proposed line or route of the telegraph. It is claimed by the appellants that the petition does not set forth precisely what it demands, and just what portion of the defendant's property it proposes to take or condemn. The petition is not justly subject to the charge thus made against it. It is sufficient to describe the land condemned with reasonable certainty. (*Springfield and Ills. S. E. Ry. Co.* v. *Turner*, 68 Ills., 187; *C. and E. R. R. Co.* v. *City of Pontiac*, 169 Ills., 155.)

"An examination of the allegations of the petition will show that the property sought to be condemned is described with reasonable certainty, where a telegraph company seeks to condemn a part of the right of way of a railroad company, the

nber and size of the telegraph poles should be stated. *room* v. *N. Y. Tel. Co.*, 49 N. J. L., 624.) Data should be en by which the location of the telegraph poles may be ermined, and the intended height of the poles, as well as the nber and size of the cross-arms they are to bear, should be icated. (*N. Y. & N. J. Tel. Co.* v. *Broom*, 50 N. J. L., 442.) Here the petition describes the right of way upon which petitioner seeks to locate its lines, as the railway of the endant running from East St. Louis to Cairo, in the manner forth in the statement preceding this opinion. The petition n states that the petitioner desires to construct a line of graph over and above said right of way, for its entire gth, from its commencement in East St. Louis to its ter- nal in Cairo; that a portion of said right of way lies in kson county; that the petitioner would locate a line of graph upon said right of way, and does not seek to acquire fee to any lands, or the right to use the same for any pur- e, but to locate a telegraph line thereon and to repair and ntain the same and to use the same for telegraph purposes; t it desires one line of poles; said line to be constructed of best material and most approved methods; that poles will not less than 25 ft. long and 1 ft. in diameter at the base, and set in the ground at a depth of not less than five feet; that n the poles will be attached suitable arms 6 feet in length, ened near the top of the poles, and insulators on which be strung at or near the upper end, wires of suitable ma- al, and sufficient in number to enable the petitioner to mptly transmit telegraph messages; that the poles will be about 175 feet from each other, and be erected on the nt of way at a distance of not less than 25 feet from the er edge of the railroad track, and upon the east side of said k, or at such points as may be agreed upon by the Tele- ph Company and the Railroad Company operating the same; t in places where the line crosses the track, or where it is essary to do so to prevent interference with the work of said lroad Company, the poles shall be so high above the ground

as to permit the wires to be strung so far above as to prevent such interference therewith; and that said poles will be erected on said telegraph line and so maintained as not to obstruct or interfere with the business or use of said railroad, or hinder the usual travel or traffic thereof, or in any manner obstruct the use of, or come in contact with, the line of any other telegraph company along said railroad. The petition thus sets forth every detail necessary to describe the location of the telegraph line; it designates the railroad track as a fixed monument, and gives the height of the poles, the diameter of the poles, the distance of the poles from the track, the distance of the poles from each other, and the length of the cross-arms. This covers every reasonable demand of the statutes. It is true that the petition does not state how many wires are to be placed upon the cross-arms except that their number will be sufficient to enable the petitioner to transmit telegraph messages. It is no more required that the petitioner should state the number of wires to be strung on the cross pieces, than it is for a railroad company, in condemning land for a right of way, to designate how many railroad tracks it will put upon the strip 100 ft. wide, which it seeks to condemn for its railroad. It is assumed that it will not put down any more tracks than the condition of its business will warrant. So here it may be assumed that the telegraph company will not string any more wires than its business will demand. It seems to be conceded that the construction of the petitioner's telegraph line will require the erection through the whole length of the railroad right of way, about 4,500 telegraph poles. To locate such poles by an individual description, so as to designate by metes and bounds the exact spot occupied by each, would require the insertion in the petition of 4,500 separate descriptions. The very statement of such a proposition shows its unreasonableness.

"Fifth. It is further urged that the petition fails to show that the proposed telegraph line will not incommode the public use of the railroad. The alegations of the petition as already

ve referred to, show that this objection is not well taken
h allegations must be considered in connection with the
cription of the location of the telegraph line. The location
the line, as indicated in the petition, shows that the public
of the railroad would not be seriously incommoded."

beg to call the attention of the court to the fact that
only difference in the petition of the defendant in error,
telegraph company, in this cause, and that in the case in
nois, is that in the Illinois case, as well as in the Ala-
ma and Tennessee cases, the petitioner set out that it
uld construct its lines not nearer than 25 feet (and in
case 30 feet) from the outer edge of the right of way;
ereas in the case at bar the petition sets out that its lines
l be constructed near the outer edge, not further than four
t from the outer edge of the right of way. That is the only
ference. Hence I say, quoting the language of the Supreme
urt of Illinois: "The location of the line, as indicated in
petition, shows that the public use of the railroad would
be seriously incommoded." In other words, the court
k judicial notice of that fact, as did his Honor Judge Simon-
, and would not postpone the rights of the defendant in
or by the trifling demand for leave to introduce testimony
prove the allegations of the answer upon which no proof
uld be admitted.

So far as the denial in the answer to the petition, that it
uld not interfere with any other telegraph line, is concerned,
eg to say that that is an immaterial averment of the peti-
n, and the telegraph company, if necessary, could answer
itself. It may be that it was answering then, but if so,
e the ghost of Banquo, it appeared in a very questionable
ape. The law is: "If it clearly appears in any case that
ere are no disputed facts bearing on the matters in issue,
l the verdict is manifestly right, and especially where the
ord shows that no other result would be obtained by a new
al, the appellate court will not reverse the same, although
ere may have been some technical inaccuracies in the in-

structions given to the jury." (Garland on Fed. Prac., sec. 358.)

The other allegations of fact in the answer, as hereinbefore shown, were wholly immaterial, and those of law the court passed upon. Upon them no proof was admissible.

There is one other point on which the plaintiff in error puts much stress, and that is that section 2010 of the Code of North Carolina provides as follows:

"Providing that only the interest of such parties as are brought before the court shall be condemned in any such proceeding; and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends."

And avers in its answer that much of its right of way was secured by deeds of conveyance in fee simple, and therefore, the same is not an easement; and undertakes to draw a distinction between an easement and a right of way, holding that it is only an easement which can be condemned in any county other than that in which it is; but when it comes to the lands held by the railroad under deeds of conveyance, that there must be a separate proceeding in each county, to condemn.

In the first place, that distinction is drawn as fine as a cobweb—too fine to be seen with the naked eye; so fine that evidently the Legislature which enacted it did not see it, and therefore did not conceive or imagine that the technical construction placed upon it by the astute and ingenious counsel for the plaintiff in error would ever be made. In that, of course, they were mistaken, from the fact that it has been made—just like it was once made in the Supreme Court of Appeals in the State of Virginia, in the case of *Postal Telegraph-Cable Co.* v. *Norfolk & Western R. R. Co.*, 88 Va.,—that the language used in the Virginia statutes authorizing telegraph companies to construct their lines "along and parallel to the railroads," did not mean along and upon the right of

but just off of and parallel to the right of way—not-
tanding the fact that it was providing for a condemna-
gainst the railroad company. Strange to say, that through
ngenious arguments of counsel, the Supreme Court of
nia held with them. But that case has recently been
uled by the present court, thus showing that if legislators
draft bills affecting the rights of railroads, do not measure
words with the same degree of precision that a pharma-
oes the proportions of poisonous compounds for an in-
the railroad attorneys will hold up their hands in holy
r, and declare that the most unreasonable construction
d be placed upon a statute, and that the Legislature did
ean what it said.

eg leave to refer the court to the opinion of his Honor
e Simonton on this question, as a full and complete an-
to the same. See opinion, pp. 66–7–8–9 of record.

the case of *North Missouri R. R. Co.* v. *Grott*, 25 Mo., 542,
ourt said:

he objections of the appellant to the proceedings in the
it Court, and relied on here for reversal of the judgment,
rst, that the defendant was denied the right of trying
sue made on the statement in the petition, that the road
l hills and valleys, and for that reason a width of 150
as necessary. The company was incorporated March 3,
The seventh section of its charter gave it the right to
a strip of land the whole length of the road, not exceeding
et in width, providing that in passing hills and valleys the
ompany may be authorized to extend the said width in
to effect its objects. * * The petitioner averred that
ad through the defendant's land passed through hills
alleys, and that a width of 150 feet was necessary for the
uction of the road. This statement was made no doubt
report of the engineer, whose judgment in that matter
lled the plaintiff, and the allegations was not traversible
defendant.

"A railroad company purchasing land for a railroad acquires an absolute fee simple, but such fee simple is acquired solely for the purposes and uses of the railway. *Norton* v. *London, &c.*, L. R., 9, Ch. d., 622; also L. R., 13, Ch. d. 268. Section 1957, Code N. C."

It is very evident that the legislature of North Carolina did not weigh its words, otherwise it would have used the expression "right of way" instead of easement or right of way; for it is immaterial how the right of way is acquired, and it is a fact that there is not a railroad company anywhere in all this country but what holds its right of way in three different ways—by condemnation proceedings, by gift and by purchase; and it is not reasonable to suppose that the legislature intended that any distinction should be drawn as to the tenure by which the railroad held its right of way. The proposition is preposterous. It is a right of way, at last; it matters not how it holds it, as was stated by His Honor, Judge Simonton, and the legislature intended by that statute to authorize the construction of telegraph lines thereon—it matters not how its tenure is held; and there is but one proceeding which could be had in any county in which or through which the railroad passes. The rule for the construction of statute is: "All its parts are to be considered, and such construction adopted as will give force and effect to all its clauses, unless they are clearly repugnant to each other." (Note on p. 541. Brown on Jurisdiction.) "But after all," says Shaw, Chief Justice, in *Hilton* v. *Norton*, 6 Cush., 680, "the best plan is to take the entire provisions of the act and ascertain it possible, what the legislature intended."

Construing this statute from a sensible standpoint, I beg to call the attention of the court to the following provision of Section 2010, just above the proviso in which the bug-a-boo is found by the plaintiff in error: "It shall be lawful for such telegraph company, first giving security for costs, to *file its petition* before the Superior Court for the county in which such lands are situated, or into or through which such easement, privilege or franchise extends," &c. That itself is amply suf-

nt to authorize the prosecution of but one proceeding nst the same railroad company in the State.

the case of *Railroad Co.* v. *Tel. Co.*, 173 Ill., 508, *supra*, the t was made in the court below, which was overruled, and ted upon in the Supreme Court that under the statutes of ois, a condemnation proceeding could not be had in Jackson nty for the whole line of the road running through eight en counties, from Cairo to East St. Louis, in the County rt; but the Supreme Court of Illinois did not so hold. The ites of Illinois (1st Starr & Curtis Stat., 483) provided: "It be lawful for a party authorized to take or damage the erty so acquired, to apply to the judge of the Circuit Court ounty Court, either in vacation or in term time, where the property or any part thereof, is situated, by filing notice me and place of presenting such petition." The court held r that statute, that there need be but one proceeding, even gh that was in a court of limited jurisdiction, to condemn right of way of a railroad throughout its entire length in State.

the case at bar, the Code of North Carolina, independent ie proviso as before quoted, is, "to file its petition before Superior Court for the county in which said lands are te, or into or through which such easement, privilege or chise extends." The proviso is, "and if the right claimed ver or upon an easement or right of way which extends more counties than one, the whole right and controversy be heard and determined in one county into or through h such easement or right of way extends."

is evident that the legislature meant to give the telegraph pany the right to condemn the right of way of railroads in county in which the right of way ran, in one proceeding he entire State. And I venture to say that no man—no er, even—ever read that statute and put the construction it that has been done by the counsel for the plaintiff in r, in this proceeding.

he point is attempted to be made by plaintiff in error that

two petitions were filed by the defendant in error—that t
one relied upon the statutes of the State, and the other up
the acts of Congress. The last petition, as shown by t
record, is an amended petition, filed by leave of the court, a
the only difference is in setting out that we had accepted t
provisions of the act of Congress of July 24, 1866, and
sired to construct a line to Winston. It claimed no right
the petition to maintain the proceedings under the acts
Congress, but as said by the Supreme Court of Louisiana
the case of *Postal Telegraph-Cable Co.* v. *M. L. & T. R. R. C*
49 La. Ann., 58; 21 S. E. Rep., 193; in construing the Lou
iana statute, holding that the words "along and parallel wit
meant "along and upon" the right of way of railroa
that the statute was auxiliary to the acts of Congress of Ju
24, 1866, authorizing the construction of telegraph lines alo
post roads.

ORDER OF CIRCUIT COURT OF SEPTEMBER 15th, 1898.

Counsel for plaintiff in error lay much stress upon the f
that Judge Simonton, in his order of September 15th, 18
directed his clerk to appoint the commissioners, and nam
the time and place when they should first assemble, and p
side at the meeting.

Section 1945 of the Code, providing for the appointment
commissioners, says:

"The court shall hear the proofs and allegations of the p
ties, and if no sufficient cause is shown against granting t
prayer of the petition, it shall make an order for the appoi
ment of three disinterested and competent freeholders w
reside in the county where the premises are to be apprais
for the purposes of the company, and shall fix the time a
place for the first meeting of the commissioners."

The order of the Judge was (record, p. 36):

"That S. L. Trogdon, Esq., clerk of this court at Greensbo

Carolina, do appoint three disinterested and competent
olders, resident in this district, and summons them before
That the said persons so selected shall act as commis-
rs to assess the damages which the Southern Railway
pany may sustain by reason of the erection of the tele-
poles and the stretching of the wires thereon of the
Telegraph-Cable Company, as proposed in the petition
d company to this court. That the said commissioners
take before the said clerk the oath prescribed in section
of the Code of North Carolina, and shall proceed in all
cts as required in said Code in assessing such damages,
ating and assessing such compensation as may be just
id Southern Railway Company by reason of the premises.
aid commissioners shall hold their meetings in the court-
of the United States, in the city of Greensboro, over
meetings said clerk shall preside, and they are author-
nd empowered to take such testimony in respect to the
lamages to the said Southern Railway Company as they
leem pertinent; not, however, extending their inquiry as
benefit to be derived to the telegraph company, or the
thereof to it. The first meeting of the commissioners,
ich the said clerk shall give due notice to them and to
rties, shall be held ten days after notice of their appoint-
has been served on the parties to this cause. After hear-
e evidence and reaching their conclusion, the said com-
oners shall reduce their award to writing and sign and
he same and file it with the said clerk of this court at
nsboro."

view of the statutes of North Carolina, and the law gov-
g the measure of damages in cases of this kind, I respect-
submit that there is no error in this order. The conten-
of the counsel for plaintiff in error that the court
in instructing the commissioners not to consider any
its that would accrue to the Telegraph Co. by reason of
onstruction of its lines upon the right of way of the rail-
is surely without merit; for it has never been held, so

far as I have been advised, by any court that any corporation condemning land for its use should be required to pay the land owner the full benefits that would accrue to it, by reason of such condemnation. Such a rule would be requiring the corporation to discount and pay in advance to the land-owner all the benefits that it could possibly derive in the future from such condemnation. The question is, not what the telegraph company would be benefited, but what the railroad company would be damaged by the construction of the telegraph line in the manner set out in the petition, as stated by the Judge.

As was said by Mr. Justice Chalmers, of the Supreme Court of Mississippi, in the case of *Sullivan* v. *Lafayette County*, 61 Mass., 271:

"He (Sullivan) is entitled to his own loss, and not to the county's gain; he obtained everything he is entitled to when he was made whole, and has no concern with the question of how much the county has gained. The measure of his damages is only that he gets the difference between the value of his property before and after the appropriation, charging nothing, however, against him, because of the enhanced value of his lands arising from the improvement made. A man who owns a narrow pass between two mountains cannot estimate his damages when it is taken for a road by the cost of tunneling under one of the mountains or surmounting the other; how much it may be worth to the public to build a road through his land is a question with which he has nothing to do."

On the same point see the case of *Union Depot* v. *Brum*, 31 Minn., 297, and Mills on Eminent Domain, Section 173.

Counsel for plaintiff in error complain that the orders of the clerk, as they call them (they are not orders, they are simply notices issued by the clerk to the commissioners) do not recite the fact that the commissioners are disinterested and competent freeholders. Such objection is too flimsy to require no-

he commissioners themselves, but only in judg-
ourt upon the award.

f the Code of North Carolina Amended after the Institution of this Suit.

ature of North Carolina of 1899, after the insti-
ceedings in this cause, amended Chapter 49 of
North Carolina, as follows (chapter 64, page 199,
of North Carolina of 1899):

AN ACT

To amend Chapter 49 of the Code of 1883.

al Assembly of North Carolina do enact:

That Sections 2007, 2008, 2009, 2010 and 2012 of
f the Code of 1883, be amended by inserting the
lephone" after the word "telegraph" wherever
sed in said sections.

at Section 2010 of said chapter 49 be further
ollows: By striking out all after the word "pro-
e 19 in said section, and inserting the following
f: "that only the interest of such parties as are
re the court shall be condemned in any such pro-
d if the right of way of a railroad or railway
ends into or through more counties than one, the
and controversy may be heard and determined
y into or through which such right of way ex-
ided, further, that it shall not be necessary for
to make any survey of or over the right of way,
y map or survey thereof, nor to file any certificate
n of its line by its board of directors."

at Section 2011 of said chapter 49 be amended as
striking out the word "easement" in line 9 of
and insert in lieu thereof the words "right of

ded as follows: By inserting between the words "chap- and "for," in line 10 of said section, the following: "or mendments thereto."

. 5. That all laws in conflict with this act are hereby led.

. 6. That this act shall be in force and effect from and its ratification.

the General Assembly, read three times and ratified, this ay of February, A. D. 1899.

C. A. REYNOLDS,
President of the Senate.

H. G. CONNOR,
Speaker of the House of Representatives.

as it will be seen that the legislature of North Carolina, zable, no doubt, of the technical pleas entered by this iff in error in this proceeding, so contrary to the policy e state, made the above amendment, which effectually nates every single objection made by the plaintiff in error procedure on the part of the defendant in error.

o not deem that the amendment was necessary, in order intain this proceeding, but, it having been made by the ature, the defendant in error is entitled to its benefits: e rule is, "that there is no such thing known as a vested in a public law which is not in the nature of a grant, and gislature may repeal all laws which are not in the nature ntracts or private grants." *Dobbins, et als*, v. *First nal Bank*, 112 Ill., 533.

o person can claim a vested right in any particular mode ocedure for the enforcement or defence of his rights. e a new statute deals with procedure alone, *prima facie*, olies to all actions—those which have accured or are ng and future actions. If before final decision a new s to procedure is enacted and goes into effect, it must

ern and regulate the proceedings." *Sutherstruction*, Section 482.

inciple, indeed, seems to be that alterations dways retrospective, unless there be good Where, for instance, the defendant pleaded small sum that the jurisdiction of the court ay by a court of Request Act, and that act the plea, but before the trial it was held as entitled to judgment." *Endlich on the tatutes*, Section 286.

, the general rule seems to be in accordance hat statutes pertaining to remedy, *i. e.*, such rse and form of the proceedings for the enght, but do not affect the substance of the ncced, and neither directly nor indirectly for the enforcement of the right, are retroapply to causes of action subsisting at the ge." *Idem*, Section 287–288.

ffaras, et al., 15 Fed. Rep., 147, Judge Hamtutes which are remedial will be given a unless they direct to the contrary. Where, f Congress enlarges the jurisdiction of the ll be considered to apply to cases pending at the passage of the act, unless excluded cessary implication from the language of the

Respectfully submitted,

J. R. McINTOSH,

Counsel for Defendant in Error.

Office Supreme Court U.S.
FILED
NOV 10 1900
JAMES H. McKENNEY,
Clerk.

McIntosh v. R. R. Co.

Nov. 2, 1900.

IN THE

t of the United States.

ber Term, 1900.

No 64.

RAILWAY COMPANY,

AINTIFF IN ERROR,

VS.

GRAPH-CABLE COMPANY,

ENDANT IN ERROR.

IENT BY J. R. McINTOSH,

Defendant in Error.

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of the United States.

Term, 1900.

No 64.

AILWAY COMPANY,

TIFF IN ERROR,

VS.

APH-CABLE COMPANY,

DANT IN ERROR.

NT BY J. R. McINTOSH,

endant in Error.

NOVEMBER 2d, 1900.

pared an argument in behalf of the cause, which I will read. It is not , in the language of the Supreme case of the *Postal Telegraph-Cable* nn., p. 58, in speaking of the statutes condemnation proceedings by tele- railroad companies in that State,

ıte was auxiliary to the act of Congress,
d in the construction of telegraph lines,
government the use of the same for pos-
er purposes,' approved July 24th, 1866;"
ument which I will submit now is auxil-
tofore filed in this cause.

the cause was instituted by authority of
3 of the Code of North Carolina, for the
ın easement along and upon the right of
Railway Company through North Caro-
in and operate a telegraph line thereon.
e North Carolina Code provides that any
hartered in North Carolina or any other
right to construct, maintain, and operate
ong any railroad or other public highway
t such lines shall be so constructed as not
er the usual travel on such railroads or

rizes the telegraph companies to contract
such right and privilege.

ires that said telegraph companies shall
over the lands, privileges and easements
d corporations, &c., upon making just
making of just compensation is the only con-

ides that, when said telegraph company
ight by contract or agreement, upon giv-
it may file its petition before the superior
into or through which said easement,
e, exists, or, if the right claimed be over
or *right of way* to or through more coun-
hole right or controversy may be heard
one county into or through which said
way extends, and that the petition shall
e or easement claimed, the owners of such
and must be sworn to.

The only av
the petition a

First, That
Second, Tha
the right soug
Third, Tha

Section 201
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Court, shall b
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Section 201
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The petitio
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The petitio
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to the Superi
April, 1898, te
defendant.

On the day
presented to t
Railway Comp
Circuit Court
North Carolin

The petitio
of the parties
$2,000, &c.

y this statute to be made in

pany is incorporated.
pplication therefor to secure
greement.
ty for costs.
y of the petition, with notice
be presented to the Superior
ndant at least ten days prior
the court.
procedure in such cases shall
9) for condemning lands for

mmissioners are not required
rest their finding from the

mpany strictly and minutely
ute, as will be seen by refer-

e clerk of the Superior Court
the easement or right of way
through the several counties
ugh the county of Guilford,
petition would be presented
l county on the 22nd day of
e same, was served upon the

when the petition would be
was presented to the court, the
and bond for removal to the
s for the Western District of

ed a diversity of citizenship
unt in controversy exceeded
he Telegraph Company filed

with the clerk of the Superior Court, alleged that the rail
right of way was 100 feet in width, that the telegraph
would be constructed by planting poles 26 feet in length,
in the ground, 4 feet from the outer edge of the railroad
of way, and that the railroad track was 4.8 wide: h
it is apparent to the court from this averment in the pet
that the poles, when erected, would be 21 feet above the gr
and 43 feet 8 inches from the outer edge of the track, a
tance of more than twice the length of the poles. And, i
event the Railway Company should express a desire fo
location of said line at some other point on the right of
than as designated, or at any time, should desire to change
location of its tracks, or to build new or additional tracks,
tracks, turn outs, turn-tables, or the use of its lands for
railroad purposes, the Telegraph Company proposed to re
its lines, upon reasonable notice, at its expense, to such o
points on the right of way as might be designated by the
road Company; that it would not build its lines upon
embankments, or attach its wires to any trestle-work or bri
of the Railway Company, and that its line, when built, w
be no damage to the property of the Railway Company
impair or injure the value of the railroad right of way
railroad purposes, but that the same would be beneficial to
Railway Company; that it did not desire or seek the fe
any portion of the right of way, but only the right to constr
maintain and operate a telegraph line along and upon
railroad right of way, all the time recognizing the supe
right of the Railway Company to the entire right of way,
should be needed for railroad purposes.

Upon that record—those pleadings—the State Court o
ruled the motion for removal, for the reason, as stated in
judgment of the court denying the motion, "The court h
ing that the amount in controversy is not shown by the plead
in said cause to be as much as $2,000, and from the facts sta
in the petition of the Telegraph Company, the court is of
opinion that the amount of damages to which the Railr

mpany is entitled from the Telegraph Company is less than 000."

Then the Railway Company obtained a temporary restraining er from his Honor, Judge Simonton, of the United States cuit Court, for the Western District of North Carolina, re- ining the Telegraph Company from proceeding further in State Court, which was afterwards made perpetual, and a tion to remand to the State Court was overruled.

The Railway Company then filed a motion, containing 16 unds, which Judge Simonton styled a demurrer, to dismiss petition of the Telegraph Company, filed before the clerk the State Court, which motion or demurrer was overruled. en Judge Simonton made an order for the appointment of mmissioners to assess the damages. The Railway Company ed and procured leave to file an answer to the petition of Telegraph Company, the court in the mean time suspend- the order for the appointment of commissioners, when the egraph Company demurred to the answer, which demurrer by the court sustained, and an order made reinstating the er appointing commissioners. The Railway Company then tioned the court for leave to introduce testimony to sustain nswer, to which a demurrer had been sustained, which peti- was by the court denied. The Railway Company then tioned for writ of error, for appeal to the Circuit Court of peals for the Fourth Circuit, which was denied on the ground no final order had been made in the cause. Then the rneys for the Railway Company went before Judge Nathan f, in the City of New York, when and where he made an er, setting aside the order of Judge Simonton, and grant- a writ of error, and the cause was thus appealed to the cuit Court of Appeals, which court, composed of Judge f, as President, and Judges Morris and Brawley, sustained otion to dismiss the writ of error, which had been granted Judge Goff, for the same reason that Judge Simonton had sed it, want of jurisdiction, because no final order had n made in the cause. Judge Goff then made an order re-

instating the order for the appointmont of commissioners and directing the clerk of the Circuit Court at Greensboro to summons the commissioners, theretofore appointed by him under the order of Judge Simonton of September 15th, 1898 which was done and the commissioners, after due notice to the parties and hearing the proof adduced, assessed the damages at $10, but, before the expiration of 20 days, which, under the statutes of North Carolina, the Railway Company had for filing exceptions to the report, and before which time the court could not confirm the report of the commissioners, a writ of error was granted by the Honorable Chief Justice of this court to the Circuit Court of Appeals, with *supersedeas*, whereupon the Telegraph Company entered a motion, in the alternative either to dismiss the writ of error, for the want of jurisdiction as no final order had been entered in the cause, or to discharge the *supersedeas*, and the motion to dismiss was denied, but the *supersedeas* was discharged, so that the Telegraph Company could proceed to construct its line.

This is a brief, but correct, statement of the case.

The argument by the attorneys for the Railway Company, made in their brief filed in this cause in May, 1899, and referred to in their last brief, whereby they undertook to demonstrate that the opinion in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337, was not an authority for us in this case, in this: that, under the eminent domain statute of New Jersey, as declared by this court, the damages assessed were not payable upon the mere award of the commissioners, nor until after a judgment of the court affirming such award, or the verdict of the jury rendered on appeal therefrom, and that the condemning corporation acquired no right to possession, &c., until after such judgment of affirmance and the payment of the award or judgment. There is no difference whatever between the New Jersey statute and the North Carolina statute upon that point, as shown in counsel's brief, p. 40, where they quote from the opinion of the Supreme Court of North Carolina, in the case of *Telegraph Co.* v. *R. R. Co.*, 83 N. C.,

nd three other cases from the Supreme Court of North
ina, and that the order appointing commissioners was
final order, &c., in which that court held that, "*the right*
possession is given only after final judgment of confirmation,
at no appeal lies at an earlier stage of the proceeding."
their own argument, they admit that under the North
ina statute the condemning corporation—in this case the
raph Company, had no right to take possession until after
judgment of confirmation of the report of the commis-
s assessing the damages. In that I agree with them.
hey argue that, because of the statement in my brief
in this case May 22d, 1899, after the Circuit Court of
als had sustained the motion to dismiss the writ of error
ant of jurisdiction, Judge Goff made an order reinstating
rmer order of Judge Simonton for the appointment of
issioners, and directed the clerk to summons the com-
oners, upon notice to the parties, for the purpose of as-
g the damages, which was done, and the Telegraph
any immediately paid into court for the Railway Com-
the amount assessed, and at once commenced the con-
ion of its line, as authorized by section 1946 of the Code
rth Carolina, and continued said work until interrupted
supersedeas, upon the writ of error now pending in this
and therefore the order appointing the commissioners
final order.

mitting the statement in my brief to be true, and it is
it only shows that the work then and since done in con-
ing the telegraph line upon the railroad right of way
ot authorized by the order or judgment of any court.
hat does not alter or change the law of the State,
pounded by its Supreme Court. The order appealed
to this court is the order of the Circuit Court of Appeals
ssing the writ of error to the Circuit Court. That was
final order; neither was any one of the orders made by
Simonton in the procedure of the case, a final order,
all together, they do not constitute a final order.

There are no merits in the analysis by counsel of the order f October 24th, 1898, found on pages 4 and 5 of their last rief. I insist, therefore, that no final order has been made the case, and, for that reason, the writ of error should be ismissed.

Two other grounds—

I insist that this court should dismiss the writ of error, beause the cause was prematurely removed from the State to the ederal Court.

The cases cited by counsel in their brief on this point do ot apply. Because this is a special *proceeding*, and unlike rdinary suits at law. It is the exercise by the State of its overeign right of Eminent Domain. Mr. Justice Field, in is opinion in the case of *Boom Co.* v. *Patterson*, said: "this osition is undoubtedly a sound one, so far *as the act* of appro-riating the property is concerned." He furthermore said: This proceeding in the present case, before the commissioners ppointed to appraise the land, was in the nature of an inquest o ascertain its value, and not a suit in the ordinary sense of he term, but when it was transferred to the District Court by ppeal from the award of the commissioners, it took under he statutes of the State the form of a suit at law, and was henceforth subject to its ordinary rules and incidents." (Read rom pp. 25 and 26 of my brief, also from page 24, as to the tatutes of Minnesota, and page 28, section 1945 of Code of North Carolina, and from page 31, opinion of Justice Matthews n case of *Searl* v. *School District No. 2*, and cases cited by him, nd section 1946 of Code of North Carolina on page 33.)

Counsel are estopped from saying that, at the time of the iling of their petition and bond for removal, the sole question vas the amount of damages to which the Railroad Company vas entitled, not only by section 1945 of the Code of North Carolina, but by their own argument, made in their brief filed n this cause at the last term of this court, when this question vas not before this court. On pp. 19 and 20, of what they

ree with them on that point. The Railway Com-
e right, under section 1945, to answer the petition
graph Company, and, if the answer controverted
tional fact stated in the petition, it was the duty of
hear the proofs and allegations of the parties, and
in their brief, that *determines* the existence of the
demn, and, as stated in *Boom Co.* case, "until that
United States, a separate sovereignty, has no right
by any of its departments;" and in the case of
dland Ry. v. *Jones, et al.*, 29 Fed. Rep., 193, Judge
: "The right of Eminent Domain being an attribute
nty is one of those rights the exercise of which
uestioned or challenged by the courts of any other

So far the authorities are all in accord, and when
o take is asserted and adjudged, the question of
on, a matter entirely independent of the right, still
determination. * * * When the only contro-
ning to be considered is the amount of compensa-
exists a suit—a controversy—which, under the
may be removed," &c.

he Mineral Range case, 25 Fed. Rep., Judge Brown

statute for condemnation of land also provide for
om the Probate Court to the circuit court and the
an issue there, we should find no difficulty in hold-
held in that case (*Hess* v. *Reynolds*, 113 U. S., 73)
n v. *Patterson*, that the removal should be had in
Court, and not from the Probate Court."

he removal statutes, which require "the petition
or removal to be filed at or before the time when
nt is required by the local law or rule of court to
lead to the declaration or complaint" does not ap-
class of special proceedings, for the reasons stated
ion of the court just cited. When this case was

othing had been done but to file the petition for the of the sovereign right of Eminent Domain before the d the serving of notice upon the Railway Company ould be presented to the court on the 22d day of June, d before it was presented to the court, hence, before t could have passed upon the right to condemn, it was . It was at that stage a lifeless, inanimate thing, and from the womb of the State Court into the Federal e it had the life and vitality of a suit at law.

ground for dismissal of the writ of error for want of on is, that the amount involved in this controversy from the pleading, when the cause was removed, and e Circuit Court refused to remand, is less than $2,000. eadings consisted of the petition of the Telegraph y in the condemnation proceeding, and the petition of way Company to remove the cause from the State to ral Court.

tition of the Telegraph Company sets out how its line onstructed, viz: Of the best material, and upon the proved plan, with poles 26 feet long, one foot in diam- he base, planted 5 feet in the ground and four feet outer edge of the right of way, which is 100 feet d in the centre of which is located the railroad track, inches wide, with cross-arms 6 feet in length fastened top, with insulators thereon upon which the wires e strung, and there would be about 35 poles to the at where the wires crossed the track the poles would h and the wires suspended so far above the structure ailway Company as to prevent any interference with tions of the trains; that the telegraph line would be ucted and maintained as not to obstruct or hinder the el and business of the Railway Company, nor in any rfere with the operation of said company, nor with raph line now on said right of way. In the event the Company should express a desire for the location of at some other point on said right of way than as

, or desire to change the location of its tracks,
tracks or side-tracks, &c., the Telegraph
to remove its poles upon reasonable notice,
se, to such other points as may be designated
Company. That its lines would not be at-
stle work or bridges or upon any of the em-
e Railway Company, and when the line was
uld in no way damage the property of the
y, or impair or injure the value of the said
r railroad purposes, but, upon the contrary,
cial to said Railway Company and its pat-

or removal simply alleged in the usual form,
enship, and that the amount in controversy
exclusive of interest and costs. It did not
at way or what items went to make up the
to exceed $2,000, whether the Railway Com-
amaged in that sum by the construction and
he telegraph line in the manner set out in its
the easement sought by the Telegraph Com-
orth that sum to it. I presume it was upon
it was estimated, for the reason that it is a
osition that there could be no actual damages
ompany by the construction of the telegraph
er proposed in its petition, and because from
nsel they insist that the Telegraph Company
mages to the Railway Company the benefits
ve from the construction of its line upon the
way, and not what the Railway Company
ed thereby—a proposition not contended for
world but them, not sustained by any au-
diated by all the authorities, reason, justice,
y. *Sullivan* v. *Lafayette County, Miss.*, 61
6 of my brief.
a matter of law, the damages to which the
y is entitled are merely nominal, and that it

t to the court from the pleadings in the cause
as said time and again that is the test), that
controversy is less than $2,000, and for that
it Court erred in refusing to remand the cause
rt, and therefore this court should dismiss the
that the mere statement of the jurisdictional
n for removal, that the amount in controversy
loes not give this court jurisdiction, any more
ment in a petition for the removal of a cause,
ught upon a promissory note given for $100,
ration the damages are alleged to be $5,000,
r of law only $100 with interest and costs can

must take into consideration and be governed
s in the petition of the Telegraph Company,
nce, *it is the declaration in the cause: it is the*
action. And, as a matter of law, from it the court
t the amount in controversy was less than $2,000.
e principle laid down by the Supreme Court
he case of *City of Chicago* v. *C., B. & Q. Ry.*
, affirmed by this court in 166 U. S. Rep., 226,
edings of this kind as to the measure of dam-
reme Court of Illinois afterwards, in the case
al. Ry. Co. v. *Postal Telegraph-Cable Co.*, in 173
ed a judgment for nominal damages, citing its
, and the opinion of this court in same case,
pport of it.
, but every court in the Union, Inferior and
Courts and Federal Court, before which I have
tion, has promptly and unanimously held, that
nounced by Mr. Justice Harlan in the C., B. &
e measure of damages, applies to and should
ngs of this kind, wherein a telegraph company
nt of the right of way of a railroad company,
ion and maintenance of its lines.

for it is a vital one to the company I
nd has been, since I first read it, a clear
far has agreed with me.

tice Harlan, for this court, held:

he street across the railroad track did
ith the Company's use of the right of
road purposes, then its compensation
that it belonged to the court to deter-
s by which the jury were to be governed
of compensation to the owner," and,
art of Illinois well said that 'the measure
amount of decrease in the value of the
ses caused by the use for the purposes
r the purposes of a street being exer-
se of the company for railroad purposes.
mpany is to be compensated for the
o use its tracks, caused by the existence
Citing 149 Ill., 457.

itions are asserted:

pening of the street across the right of
terfere with the company's use of its
oad purposes, then the compensation

s the duty of the court to so instruct

mpany should only be compensated for
ght to use its tracks caused by the ex-
treet.

re predicated upon the principles an-
n:

the statutes of Illinois, the Railroad
of way, although, as to this particular
simple, for railroad purposes *only*, and

e right of the company to use the lands or
r as many tracks as it reasonably required
ot affected by the opening of the street in
not acquiring the fee, was necessarily sub-
f any, of the company to lay down addi-
cessary, in the proper conduct of its busi-

e contention that the Railroad Company
ual protection of the laws, in that by the
ividual property owners were awarded as
contiguous property appropriated in the
he value of their land taken, while only
ion was given the Railway Company, was
compensation was awarded to individual
asis of the value of the property actually
d to the uses for which it was best adapted
or which it was held and used, and was
used, and compensation was awarded to
ny upon the basis of the value of the thing
d by the public, the use of the company's
treet crossing. In other words, the meas-
n or damages to which the individual was
nounced by this court in the case of *Boom*
ause the individual owns his land for any
d when it is taken for a public use, he is
ure of damages stated in that case.

he Code of North Carolina, like that of
l limits the power of railroads to *purchase*,
h real estate as may be necessary for their
aintenance, as necessary to accomplish the
rporation. In other words, inasmuch as
ny holds its right of way, unlike that of
limitations, for railroad purposes only, it
, for when appropriated for that purpose
m the market. It is as completely with-

s those pure, noble women, who
urity of angels, the self-sacrificing
the veil, are withdrawn from the

e for the measure of damages to
entitled when crossed by a street,
this kind?
ssing, the railway company is sub-
more damages than when a tele-
on its right of way in the manner
great city like Chicago, its teem-
cycles, on horseback, in wagons,
d now in automobiles, and every
nce, the young and the old, the
on each other, going and coming
e right to do when opened for a
ssitates the utmost care and vigi-
employees, who conduct the hun-
of the company daily over that
ger the lives, limbs, and property
e right to cross their tracks, and,
uous and great expense, to main-
s and gate-keepers, who, like sen-
he army, must be ever watchful
ompany against incalculable dam-
their negligence. It was because
enied the Railway Company dam-
such crossing, that brought forth
on of Mr. Justice Brewer.
not put to any expense whatever,
veniencd in the least by the tele-
way.
ected by the erection of its poles,
of the poles, above ground, from
t of way being 100 feet wide, and
es in the centre of it, the poles

outer edge of the right of way, will be
, or 43 feet 8 inches from the edge of
ng 26 feet long, planted five feet in the
ove ground, leaving a distance of twice
inches. They cannot be erected upon
e line fastened to any of the trestle or
; and if, at any time, the Railway Com-
any portion of its right of way used
, it will be removed, upon reasonable
of the Telegraph Company, to such
nated by the Railway Company. Thus
right at all times of the Railway Com-
of way. Thus bringing the Telegraph
le laid down by this court in the Chi-
e opening of the street across the com-
not acquiring the fee simple title—was
the right, if any, of the company to lay
, if necessary, in the proper conduct of

nced by this court in that case was not
pon reason and justice. It is the law of
ed by the Court of Queen's Bench in
Works, 6 C. Q. B., 40. In that case
d of Works, by act of Parliament, was
a portion of a church-yard for a public
hat in the hands of the church it could
purposes; it was, therefore, practically
it was then needed for a public use, the
ereby be benefitted; that it could have
l to it, simply because the Legislature
e transferred from one public use to
saying: "When Parliament gives com-
ovides that compensation shall be made
n the property is taken for the loss he
that he shall be compensated to the ex-
his loss shall be decided by what was

the value of t
value of it to
could never ha
to him they w

The Suprem
119 Ill., 529, s
statute, or by
holds his title
of it, so that
measure of hi
demnation, wi
he is so restri

It was so he
ton, 137 Mass.
ported in 1834
applicable to c

Mr. Cook, i
934, p. 2234,
has a right, u
of way of a ra
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telegraph compa

The Suprem
above cited, 1
tion fails to
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the petition, a
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That court
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it. The plaintiff, as rector,
se church-yards; therefore,
ss."
in *Railroad* v. *Catholic Priest*,
vner of land is restricted by
instrument under which he
g order, to a particular use
pply it to any other use, the
re his land is taken by con-
, for the *special use* to which

10 C. B., 327; *Allen* v. *Bos-*
149. The last case was re-
not new, but old principles

k on Corporations, in sec.
Where a telegraph company
a State to condemn a right
to be paid the railroad com-
railroad company owns only a
is not interferred with by the

in the Postal Telegraph case,
further argued that the peti-
osed telegraph line will not
railroad. The allegations of
rred to, show that this objec-
ations must be considered in
e telegraph line. The loca-
the petition, shows that the
be seriously incommoded."
paces between the poles and
en, that Telegraph Company
Railroad Company from the
of the Railroad Company

remains as it was before. In that case, a judgment for n
damages was sustained, the court holding that the p
announced by this court in the C., B. & Q. case, 166
governed that case.

The Supreme Court of Tennessee, in the case of *
Ohio R. R. v. *Postal Telegraph Co.*, 46 S. W. Rep., 576, su
a judgment for nominal damages only, and held that th
ciple announced by this court in the C., B. & Q. case ap
and must govern that case. The court said: "This is
a case where the railroad is not using the space occu
the posts and wires, and when it cannot convey it to
for any purpose, in which case only nominal damages
And, approving the rule laid down by the lower cour
"This rule was no doubt adopted from the rule laid d
the Supreme Court of the United States in the case of
& Q. Ry. v. *City of Chicago*, 166 U. S. 248."

The Supreme Court of Alabama, in case of *M. & O.*
Postal Telegraph Co., 24 Southern Rep., 408, in a case a
from Mobile county, said:

"In the case before us, a very nominal amount of la
stituting right of way, is proposed to be taken—only th
of it occupied by the posts, 175 feet apart, leaving the
all other purposes unobstructed. It is really an ease
an easement, a servitude true, for which the compan
titled to some compensation under the constitution. Th
road Company, however, holds its right of way, so f
made to appear, simply for railroad purposes. Under th
of the estate that the railroad has in its right of wa
difficult to see how the damages sustained by the road
anything more than nominal. Indeed, if we might
advantages and disadvantages, a competing line would n
and reasonably appear to be an advantage to the R
Company. * * * The land constituting the right
really has no market value so long as it is used for su
poses. It has been withdrawn by the very uses of the c
from marketable lands; and, when there can be no

value of land, by reason of its use as a part of an extensive business or enterprise, its value must be determined by the uses to which it is applied, and necessarily not by any supposed market value it has," citing *I. C. R. R.* v. *City of Chicago*, 141 Ill., 500; *C., B. & Q. R. R.* v. *City of Chicago*, 166 U. S., 226, and *Lewis on Eminent Domain*, Sec. 485.

The Supreme Court of Mississippi, in the case of *M. & O. R. R.* v. *Postal Telegraph-Cable Co.*, 26 Southern R., 300, said:

"We adopt the rule as first above stated in *St. L. & C. R. R. Co. v. Postal Telegraph Co.*, 173 Ill., 534," and say: "This is undoubtedly the sound view. Mr. Justice Harlan puts the point with great clearness in the same case at page 258, 166 U. S. Compensation was awarded to the railroad company, upon the basis of the value of the thing actually appropriated by the public—the use of the Company's right of way, for a street crossing, having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad was left in possession and use of its property for the purposes for which it was being used, and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the law, &c. * * * The doctrine in *Boom Co.* v. *Patterson*, 98 U. S., 402, has no application to shis case. Patterson owned his land absolutely, to be used or sold for any purposes he pleased. His use of it was not limited, as in the case of the right of way by a railroad company.

"The doctrine by Mr. Justice Harlan, for the United States Supreme Court, above, and of the Supreme Courts of Illinois, Alabama and Tennessee, is undoubtedly the only correct view, and, if the case of the *Postal Telegraph-Cable Co.* v. *Vicksburg R. R.*, 68 Miss., 314, conflicts with what is here announced, it is to the extent of such conflict, hereby overruled."

In the case last referred to, that court had applied the doctrine in the Boom case, applicable to a proceeding of this kind.

The Supreme Court of Texas, in two cases, has recently fallen into line with the current of authorities, and held, that the principle announced by this court, in 166 U. S., 226, governs proceedings of this kind. *Southwestern Telegraph, &c. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 52 S. W. Rep., 106, and *Texas & New Orleans R. R.* v. *Postal Telegraph Cable Co.*, 52 S. W. Rep., 108.

Judge Beatty, for the Circuit Court of United States, for District of Idaho, rendered an opinon in a condemnation proceeding by the *Postal Telegraph Co.* v. *The Oregon Short Line Ry. Co.*, which I argued before him last May, in which he says:

"As to the rule of assessing damages, the adjudications differ, but that fixed by the United States Supreme Court must be followed, which seems, by the *Chicago, Burlington, etc. R. R.* v. *Chicago*, 166 U. S., 224, to be the amount of decrease in the value of the use of the railroad right of way, for railroad purposes, caused by the use of plaintiff of such right of way for its telegraph poles and lines." (Not yet reported.)

Lewis on Eminent Domain, Sec. 462, says: "Just compensation, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use." Citing a long list of authorities. The same author, in Section 269, says: "A telegraph line constructed on the right of way of a railroad is no material interference with its use for railroad purposes."

The question I submitted in the beginning of my argument on this point, why the rule announced by this court in the case of *C. B. & Q. R'y Co.* v. *City of Chicago*, does not apply in a case of this kind, has been answered by every court which has had occasion to pass upon the measure of damages to which a railroad company is entitled when a portion of its right of way is taken for the use of a telegraph line. No

hat, but they all hold, as did this court in the C. B. & e: "If the opening of the street across the railroad did not unduly interfere with the company's use of the of way for legitimate railroad purposes, then its com-tion would be nominal."

d they all hold, as well as Lewis on Eminent Domain, Cook on Corporations, that there cannot be any interfer-with the operation of the railroad's trains on its track, the telegraph is constructed in the manner set out in the on, and the Supreme Court of Illinois, in 173 Ill., says: se allegations in the petition are in the nature of stipu-s, to which the petitioner binds itself. Such stipulations been held valid by this court," &c.

e court should take judicial knowledge of the fact, that would be no interference with the "usual travel," in the age of the North Carolina statute, of the railroad by the ruction of the telegraph upon the railroad right of way, e manner proposed. It no more interferes with it than en walking upon the sidewalk of Pennsylvania Avenue ere with the running of the street cars. As the Supreme of New York has taken judicial notice of the fact that ng hours are from 10 A. M. to 2 P. M. (115 N. Y., 250); ity lots in New York city have a certain depth, and the ings on corner lots often cover the whole lot (85 Hun., that a certain town is in a certain county (131 N. Y., that a trolley car can be stopped in less than 100 feet . Y. Supp., 441); that streets in New York run in a cer-direction, and begin and end in certain places (27 N. Y. , 304); that the pole and front wheels of a wagon may at right angles to the wagon (41 N. Y. Supp., 102).

e Supreme Court of Alabama, in the case before cited, that court, says: "Common knowledge teaches that there ple space on the hundred feet of the railroad's right of for two or more telegraph lines, without obstructing the nd ample use of it for railroad purposes,"

espectfully submit, therefore, that under these authorities,

a legal proposition, it was apparent from the pleadings, hen the cause was removed, that the amount in controversy was s than $2,000; hence, the Circuit Court had no jurisdiction, d erred in overruling the motion to remand, and the writ of ror for that reason should be dismissed, the ex parte affi- vits, filed after the cause was removed, to the contrary not- thstanding. Those affidavits, nor any of them, are compe- nt testimony.

In their argument upon this jurisdictional point they quote om their answer, filed several months after the removal of e cause, and after the court had refused to remand it. The egations of that answer, so made, did not, of course, consti- te a part of the pleading at the time of the removal, upon hich alone the court was to determine the jurisdictional ques- on of the amount involved in the controversy. They quote d rely upon the averment in their answer that the telegraph ne, as proposed in the petition, could not be constructed so not to interfere with the usual travel, &c., because they ege that in many places the right of way is too narrow to rmit it.

The answer to all that is, that the condition made in the atute that the line shall be so constructed as not to interfere th the usual travel, is a condition subsequent, like the con- tion in thousands of deeds of conveyance made to railroads r right of way, on condition that the railroad company will tablish a depot on said lands, that is the consideration to the antor for the supposed enhancement of the value of the mainder of his lands. The railroad company accepts the eds upon that condition, and then is bound to establish the pot as proposed; otherwise, the consideration for the con- yance fails, and a court of chancery would cancel and annul e conveyance, or the railroad company would be liable at w in damages to the grantor for breach of contract. The ilroad company could not establish the depot until it first ceived the conveyance. The establishment of the depot was condition subsequent. So it is, the telegraph could not es-

line until it had the authority of court, and the
n of the line as provided for by statute is a condi-
uent.

if the court please, in their answer they do not state
v is the right of way at such places, so that the court
e of it; but content themselves with such slipshod
this: "That such right of way varies greatly in
ndry points covered by the condemnation proceed-
so narrow that to erect a telegraph line thereupon
npracticable, or, at least, would greatly imperil the
ion of the defendant's railroad, and grossly obstruct
he usual travel thereupon, and that it will not be
construct and maintain a line of telegraph upon its
set out in said petition in such a manner as not to
hinder the usual travel upon defendant's railroad."
re do they say how wide the right of way is at such
v places, whether 20 feet, or 40, or 80 feet, or how
ch strips, whether 50 feet, or 100 feet, or 1,000 feet,
urt might judge of the reasonableness of the allega-
or that reason it was demurrable.

e bear in mind the principle announced by this court
of *C., B. & Q. Ry. Co.* v. *City of Chicago*—that the
on would be *nominal*, if the railroad's use of its
e not unduly interfered with for railroad purposes
ssing of the street; that the measure of compensa-
amount of decrease in the value of the use for
rposes caused by the use for the purposes of a street,
ised jointly with the use of the company for rail-
oses; that a railroad company can acquire land,
voluntary purchase or otherwise, only for railroad
that the only question to be determined by the jury
at extent was the value of the company's right to
d for railroad purposes unduly diminished by open-
et across it; that the right of the Railway Company
ight of way for as many tracks as it reasonably re-
its business was not affected by the opening of the

he city not acquiring the fee, was necessarily subject
right, if any, of the company to lay down additional
f necessary, in the proper conduct of its business; and
vas the duty of the court to determine these legal prin-
y which the jury were to be governed in fixing the
of compensation to the owner—in other words, virtu-
nstruct the jury, as a matter of law, that the Railroad
ıy was entitled to only nominal damages; and, in view
act that the petition of the Telegraph Company for the
way shows upon its face, conclusively, that the line so
ted would not interfere in the least with the operation
ailway's trains, the only purpose for which it held its
way, all the time recognizing the prior right of the
company to its right of way for railroad purposes; and
damages to which the railway company would be en-
ere merely nominal, as stated by Cook on Corporations,
vis on Eminent Domain, and as stated by all the courts
e opinion in the C., B. & Q. case was handed down,
principle therein announced for the measure of dam-
ntrols and governs in cases of this kind, which is such
l, reasonable, and legal conclusion that no court, in-
superior, has disputed it, I insist that this court should
hold that, from the record, the pleadings at the time
val, which consisted only of the petition of the Tele-
Company for right of way, and the petition of the
Company for removal, that the amount in controversy
s than $2,000, hence the Circuit Court acquired no
ion.

counsel, in order to avoid the force and effect of my
nt on this point, say, that when the court passed upon
rruled the motion to remand the cause there were four
s filed by the Railway Company not replied to by the
ph Company, that the amount in controversy exceeded
nd afterwards, the answer, which was sworn to alleged
$60,000. For reply to that I have this only to say:
sdictional question as to the amount involved in the

ld have been determined by the court from ecord, *when* the cause was removed, as stated ge 6 of their last brief, where they say: "As tood, the Federal Court, not the State Court, jurisdiction to determine the question of fact viz: *the amount involved*," which is sustained es there cited by them; hence, the *exparte* ter the cause was removed, should not have by the Circuit Court, and were not, as will be pinion of Judge Simonton, overruling the d. Besides, those affidavits, as I will show, they were not worth the paper upon which n. The substance of them is as follows:

filed by the Railway Company in the Circuit ges to which the Railroad Company is entitled

D. Myers, which says in his opinion the right legraph Company upon the Southern Rail- in North Carolina is worth more than $2,000.

M. R. Talcott is that, in his opinion, the sum awarded to the Southern Railway as compen- t of way ought, in his judgment, to be largely , exclusive of interest and costs.

ank S. Gannon is that, in his opinion, the t of way to the plaintiff, if condemned for the ff, would certainly be largely more than $10 t the damage sustained by the defendant, by ndemnation and use of its right of way by erection and maintenance of the poles and right of way, thereby interfering with de- trol of its right of way, would be more than s therefore of the opinion that the amount in s proceeding is more than $2,000.

R. Sully says he has no hesitation in saying,

xpert, that the sum justly due to the Southern
npensation for the proposed condemnation of
ay throughout the counties and between the
very greatly exceeds in value the sum of $2,000,
terest and costs. He furthermore says that, if
s proposed in the petition of the Telegraph
ove its lines when the ground occupied by it
ed by the Railroad Company, if it could be em-
order of the court condemning the property
se, tend to lessen the otherwise intolerable em-
bstruction and damage to a railroad company,
nforced occupancy by the Telegraph Company
way, yet it will not seriously modify the state-
ion above given. Affiant then states that the
Telegraph Company pays in excess of $2,000
of 193 miles for the right of way of railroads
is connected.

t therefore, that these experts made their affi-
al principles, and do not state upon what basis
opinions are formed; hence such opinions are
all the authorities as incompetent and not evi-
e measure of damages to which the Railway
titled by reason of the construction of the tele-
ne manner proposed in its petition in this cause.
practice in the Circuit Court in civil cases is,
and the evidence in a cause is such that the
l bound to set aside any verdict of the jury for
defendant, it is the duty of the court to take
the jury, or peremptorily instruct the jury to
aintiff or the defendant, as the case may be.
le, I submit, if the case as to the measure of
een tried by a jury, it would have been the duty
pon the pleadings—the record when the cause
o have instructed the jury peremptorily to find
damages, because, as a matter of law, upon the
lway Company was entitled to only nominal

matter of law, this court will deter-
y of the Circuit Court to have done,
nvolved in the controversy.

ntiff in error, now, upon the home-
sure they consider the paramount is-
is, the sacred right of trial by jury,
th amendment to the Constitution of
ections 648 and 649 of Rev. Stats., and
of North Carolina, providing for the
by the commissioners, must give way
ev. Stats., because to adopt the State
sistent with the terms, defeat the pur-
ect of legislation by Congress: there-
intment of commissioners by the Cir-
s the seventh amendment, in conflict
id. This argument is in conflict with
in this cause, the rulings of this court,
ecisions of State Supreme Courts.

estion settled, it is that: "A constitu-
to a jury trial is satisfied, if the jury
eal. The primary assessment may be
or viewers." 87 Ala., 328; 52 Ark.,
a., 257; 39 Am. & Eng. R. R. cases,
d., 143; 9 Iowa, 594; 7 Md., 500; 1
ay. 530; 57 Mo., 599; 113 Mo., 390;
557; 66 N. H., 181; 45 N. J. Eq.,
5; 4 Ohio St., 167; 7 S. Dak., 310;

de of North Carolina provides as fol-

oners) shall report the same (their
eh here means the clerk) under their
ain twenty days after filing the same,
said land may file exceptions to said
ermination of the same by the court

k) either party to the proceedings may ap-
at term, and thence after judgment to the
The court or judge on the hearing may direct
nodify or confirm the report, or make such
ises as to him shall seem right and proper.
ny, at the time of the appraisal, shall pay
n appraised by the commissioners, then and
said company may enter, take possession of,
ds, notwithstanding the pendency of the ap-
e final judgment rendered on said appeal or
But if the court (meaning the judge) shall
the land, or any portion thereof, to the use
then and in that event, the money paid into
thereof as shall be adjudged, shall be re-
mpany. And the company shall have no
l lands not condemned, but shall surrender
the same on demand, to the owner or own-
agent or attorney. And the *court* or *judge*
ver and authority to make such orders, judg-
s, and issue such executions and other pro-
cessary to carry into effect the *final* judgment
proceeding. The costs in this proceeding
either party as the judge or court in his dis-
dge."

ons of this statute, either party has twenty
file exceptions to the report of the commis-
the determination of such exceptions by the
y may appeal to the court *at term*. Thus
to this time the whole proceedings are to be
erk, who is, under sections 132 and 251 of the
Code, to be considered the "Court" in such
m his ruling appeal may be had to the court
ere is a jury, and where all questions of fact
by a jury. Section 405, provides that "the
beginning of the court swear such of the
f the original panel to try *all civil cases.*"

If issues, both of law and of fact,
aised before the clerk of the supe-
the case to the civil issue docket
he ensuing term of the superior

Trial by jury may be waived by the
of fact, in actions on contract, and
rt in other actions in the manner
appear at the trial. (2) By written
orney, filed with the clerk. (3) By
minutes.
t foot of this section.)
extraordinary care the right of trial

gain declared, that in proceedings
urely statutory, the Circuit Court
of the statutes of the State from
ed.
he case of *Southern Telegraph Co.* v.

only, and every court which takes
ment is limited in its powers by the
t can act. * * * * The courts
removal of the proceedings from
othed with no greater power in the
the State would have possessed if
preserved."

, in the case of *Belmont Bridge* v.
S., 287, went so far as to hold that
the Circuit Cout to appeal a cause
r of the Circuit Court appointing
contrary to all precedent of this
Supreme Court of West Virginia,
e had been removed, had held, in
an appeal to the Supreme Court

ten from such order, the court stating
g was made alone in order to conform
Court. The court said: "The judg-
been considered as so far final as to
; and if the Supreme Court of a State
n inferior court of a State to be final,
it in any other light in exercising an

on proceedings in which a contrary
in the case like *Luxton* v. *North River*
he proceeding was conducted, not by
ute, but by act of Congress, which
d conform as near as may be to the
he condemnation of land for railroads,
y at variance with the act of Congress,
e proceedings were instituted, and so
ey were not pursued.

main, Sec. 311, says that some consti-
mmon-law jury of twelve, and others
nay be ascertained by commissioners,
lve, but, in the absence of an express
it is not a matter of constitutional
ny of our constitutions were adopted,
n England and America to ascertain
er agencies than a common-law jury.
2 that in those States where a jury
by express provision of the Constitu-
ury trial may be had on appeal. And
at in the absence of a special consti-
egislature may prescribe such mode as
g the compensation; that a court or
jury is an impartial tribunal, so are
egrity and fair intelligence forming a

of the present Constitution of North
75, is: "In all controversies at law

respecting pr
the best secu
main sacred

That same
of the Consti
istration of G
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In the fund
the charter o
amended by t
111 it is provi
of any freema
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trial of the is

Section 22
vides, that, "
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except the iss
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as shall be pr
them shall be
when there, t

Heretofore,
their several
ramifications
their technic
that the court
guide and con
issue, they "

node of trial by jury is one of
the people, and ought to re-

be found in Sec. 19 of Art. I
ed under the military admin-
as copied from Section 14 of
State by Congress in 1776.
on of Carolina, authorized by
, framed by John Locke, and
y in the year 1669, in Section
e, whether civil or criminal,
any court of judicature with-
well understand, therefore,
oic people, who at Charlotte,
oclaimed the first declaration
ritain, should, in the statute
ove shown, provide for the
a jury.
he present Constitution pro-
shall be, at all times, open
ss within their jurisdiction,
g a jury." That is but a re-
onstitution of 1868. Section
s, that, "The clerks of the
tion of the probate of deeds,
ry, &c., *and such other matters*
issues of fact joined before
uperior court for trial." And
be tried by a jury.
for the plaintiff in error, in
ause, and throughout all the
roceedings, made tedious by
shouted for, and demanded
tutes of North Carolina as its
en they raise their *paramount*
st that the statutes of North

Carolina be ignored. Just as they now do, in their effort
evade the force and effect of the point I make, that the ca
was prematurely removed, when they said in one of th
former printed briefs: "In short, our view is that a cond
nation proceeding, of the character of that under investigati
substantially embraces two separate and successive proceedin
the fact of which concern only and must determine the ex
ence of the right to condemn, and the second is limited to
subsequent inquiry as to the amount of compensation to
paid for property adjudged in the first proceeding to be lia
to condemnation." Page 19 of fifty page brief for plaintif
error, filed October, 1899. But in their last brief, since I h
raised that point, and insist upon the doctrine there announ
by them, as authority for the position that the case was p
maturely removed, they entirely ignore it. The truth is, th
have written too much—they have written a book, and I n
appreciate the exclamation of Job: "Oh, that mine ene
would write a book!"

The provisions of the Constitution of North Carolina, abo
quoted, and the statutes of the State pursuant to them,
only sustain my contention on the point that the cause
prematurely removed from the State Court, but they and
citations from Lewis on Eminent Domain, from the opini
of this court and other authorities, clearly demonstrate th
there is no merit in their argument that the statutes of No
Carolina are in conflict with the 7th amendment to the Con
tution, and sections 468 and 469 of the Revised Statutes.

Counsel for plaintiff in error say they have not appeal
from the order of the Circuit Court of Appeals, dismissing
writ of error, by which the cause was appealed to that co
from the Circuit Court, nor from the order of the Circuit Co
for the appointment of commissioners, but from the order
that court of October 24th, 1898, sustaining demurrer to th
answer, and refusing to hear testimony to sustain the answ
to which the demurrer has been sustained. For a compl
answer to their complaint on that score, I respectfully re

the court to the opinion of his honor, Judge Simonton, upon that matter, at page 56 of the record. But they go into an analysis of the order of October 24th, which I will answer very briefly.

They say that was a final order, because by it the court—

1. "Determined that North Carolina statutes are in force under which the telegraph company may condemn a right of way for its purposes upon the property of the railroad."

For reply to that, I say the court was correct in that, as shown by his opinion at page 56 of record, and my brief recently filed, from pages 55 to 65, and from 87 to 89 inclusive.

2. "Prohibited testimony showing the value for telegraph purposes of the property condemned."

In that the court was correct, for now that proposition is not contended for by anyone else in the world but the counsel for the plaintiff in error, and is repudiated by every court that has uttered a word, or text-writter who has written a line upon that question. I beg to refer the court to page 86 of my brief on that point.

3. "Determined that the condemned right of way for telegraph purposes may be unfixed, shifting, and changing as a location."

I deny the charge, and respectfully refer the court to the petition of the Telegraph Company, record, pp. 3, 4, 5, and 8, 19 and 20, and the opinion of the Supreme Court of Illinois, 173 Ill., 508, saying: "These allegations in the petition are in the nature of stipulations to which the petitioner binds itself." Brief, p. 50.

4. "Determined that the entire condemnation may be had in one proceeding upon a strip of land, much of which is held in fee simple (by the railway) belonging to a single owner, and extending through twelve different counties, a distance of nearly two hundred and fifty miles."

In that the Circuit Court did not err, as shown by section 2010 of the North Carolina Code, the opinion of the court at page 56 of the record, and from pages 54 to 65 of my brief upon the merits.

5. "Determined upon demurrer that every defence set up in the answer of the Railway Company is without merit, even though it was proved by conclusive evidence."

In that the court did not err, for reasons hereinbefore argued, and those stated in the opinion of the court, p. 56 of record, and in my brief on the merits.

6. "Refused to hear proof as required by Section 1945 of the Code of North Carolina."

In that the court did not err, because the answer made no issuable fact. The only jurisdictional facts necessary under Section 2010 of the Code to be alleged were, 1, that the Telegraph Company was incorporated; 2, it had failed to secure by contract the privilege sought; 3, that it had given security for costs, all of which were averred in the petition and not denied by the answer.

7. "Determined without proof conditions precedent to condemnation under the North Carolina statute."

I deny there were any conditions precedent to the right to condemn. The condition stated in section 2007 of the Code, "that the lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway," is a condition *subsequent*, as shown in my brief, p. 69, under the head of "The Statutory Provision a Condition Subsequent," and under the head of "Necessary Averments in a Petition of a Telegraph Company," p. 72.

8. "Delegated to its clerk the power of selecting and appointing commissioners to assess damages, and authorized its clerk to preside over such commissioners."

hat the court did not err, because that was a duty that ained to the clerk of the Superior Court of the State, as from the sections of the Constitution, and the statutes, ne decisions of the Supreme Court of North Carolina, before quoted, and as shown in counsel's last brief (p. der section 103 of the Code, the clerk is expressly given , "To preserve order in his court, and to punish con-," and, as stated by Chief Justice Waite in *Southern aph Company* v. *E. T. Va. & Ga. R. R.*, 112 U. S., 306: remedy is statutory only, and every court which takes ction for its enforcement is limited in its powers by the under which alone it can act. * * * The courts of nited States, on the removal of the proceedings from the e court, were clothed with no greater power in the es than the courts of the States would have possessed, r jurisdiction had been preserved."

Delegated to its clerk powers vested in the court and in urt only."

t point has been fully answered.

"Determined that the Telegraph Company may con-take possession of, construct its lines upon, exercise ion over, and use the lands of the Railway Company ny before the entry of any further order, by the court."

hat the counsel are mistaken. The order determines no hing, as conclusively shown from opinion of Supreme of North Carolina, cited in their brief: "That the right possession is given only after final judgment or con-on, and that no appeal lies at an earlier stage of the dings."

nnot be a matter of conjecture or speculation with the whether the order of the Circuit Court of October 24, vas a final order or not, or whether, as argued by coun-had the effect of a final order; because the record in use is proof positive that it was neither. It shows there

e at least six orders made in this cause subsequent to it, it:

) Order of November 9th, p. 75 of record, refusing writ rror, and reinstating order of September 15, 1898, for the ointment of commissioners, and ordering the clerk to sum- them and proceed to assess the damages.

) Order of Judge Goff, made November 29, 1898, setting e the order of Judge Simonton, and granting a writ of r and *supersedeas* from the Circuit Court to the Circuit rt of Appeals.

) Order of Circuit Court of Appeals by Judge Goff, March 899, dismissing the writ of error before that allowed by with costs. It is, "It is ordered and adjudged by this t that the writ of error sued out in this cause be and the e is hereby dismissed."

) The mandate of the Circuit Court of Appeals to the uit Court, ordering that the cause be dismissed, and com- ding as follows:

You therefore are hereby commanded that such *further edings* be had in said cause by way of execution, as, ac- ing to right and justice and the laws of the United States, t to be had, the said writ of error notwithstanding." rd, p. 1001.

Order of Judge Goff, May 3, 1899, granting a writ of and *supersedeas* from the Circuit Court of Appeals. Re- p. 1001.

Order of this court discharging the *supersedeas* upon the of error.

sides several orders of the clerk of the Circuit Court.

Burlington, &c. v. *Simmons*, 123 U. S., 52, this court held a decree establishing the right of a junior mortgagee to m from a prior mortgagee, but not determining the amount

ay, or the amount due on the mortgage, was inter-

almira, 10 Wheaton, 502, that a decree for restitu-
sts and damages was held not to be final, as the
ere yet to be ascertained.

v. *Vasques*, 11 Wheaton, 429, where a decree for
s allowed on a libel, and commissioners appointed
the amount of damages, it was held that no appeal
ntil the commissioners reported, for it was not a

ta v. *Kelbourn*, 150 U. S., 524, a decree which re-
e to a master to state an account between the par-
which a further decree is to be entered, was held
nal.

of law being that a judgment or decree, to be final
rpose of review, must terminate litigation on the
hat an affirmance by this court, the court below
nothing to do but to execute the judgment or de-
rendered. Such was the rule stated by this court
v. *Brinkerhoff*, 106 U. S., 3.

ng that rule, we find in *Life & Fire Insurance Co.*
k v. *Adams*, 9 Pet., 571, it was held, though the
he cause have been substantially decided, while
ough formal, remains to be done, this court can-
on the subject.

horities, I respectfully submit, effectually do away
ntention of counsel that the order of the Circuit
tober 24th was a final order, because much was
one, and much was done in the progress of the
hat.

sel for the Railway Company say the Telegraph
s no right to construct its lines upon the railway
. I reply that it has, not only under the statutes
rolina, but also under the act of Congress, entitled
aid in the construction of telegraph lines, and to
e government the use of the same for postal, mili-

d other purposes," approved July 24th, 1866, Rev.
63–5269, which declares that "any telegraph company
anized, or which may hereafter be organized under
of any State in this Union, accepting the provisions
t, shall have the right to construct, maintain, and op-
es of telegraph over and along any of the post roads
nited States which have been or may hereafter be de-
ch by act of Congress, provided they shall be so con-
and maintained as not to interfere with the ordinary
such post roads," and Section 3964 declares all rail-
hich are now or hereafter may be in operation to be
ds.

n 5269 declares that "telegrams between the several
ents of the government and their officers and agents,
transmission over the lines of any telegraph company
has been given the *right of way*, &c., shall have pri-
r all other business at such rate as the Postmaster-
shall fix."

n 5267 provides that "the United States may, for
ilitary, or other purposes, purchase all the telegraph
operty and effects of any or all companies acting under
isions of the act of July 24th, 1866, entitled, etc., at an
d value, to be ascertained by five competent disinter-
rsons," &c.

n 5268. "Before any telegraph company shall exer-
of the powers or privileges conferred by law, such
shall file its written acceptance with the Postmaster-
of the restrictions and obligations required by law."
ction 5269, a penalty of not less than one hundred
and not more than one thousand dollars, is imposed
y telegraph company, having filed its acceptance of
isions of that act which refuses or neglects to transmit
h telegraphic communications as are provided for by
or by the provisions of Section 221, title, "The De-
t of War," authorizing the Secretary of War to pro-
taking meteorological observations at the military

er points of the interior of the Continent, and
e on the northern lakes and seaboard of the
rce of storms.

that, by accepting the provisions of that stat-
ph Company is bound hand and foot by the
permitting the Postmaster General arbitrarily
e rates to be paid by the Government for such
ent and bind itself to sell, at the option of the
entire property, at a price to be fixed by five
ever valuable its investment may have become
ers, by reason of the great skill, indefatigable
perb management and conduct of its affairs,
ng itself to the severe penalties imposed in
Surely, it would not have done it, but for the
ration that would accrue to it by such accept-
sideration was mainly the right to construct,
erate its lines upon all post roads. Section
at such right is given when the Telegraph
cepted the provisions of the act. It certainly
of Congress that it should, in consideration
efits to the Government, exercise that privi-
lege accorded to it by the act. The right of
graph-Cable Company to construct, maintain,
nes upon the right of way of the railroads is
ll the rights guaranteed to it by that act, for
mon *knowledge* of the fact that there are but
ph lines in the United States—the Western
stal—and the former has its lines upon virtu-
ads in the country, under an exclusive con-
ourt has so often declared void, and the Postal
ly compete with it unless it is given the same

with its *seventy-six* millions of population, en-
nceivable enterprise, with that courage, energy
given it, though yet in its infancy, a controll-
the great powers of the earth, is too large,

too diversified, and the competition in trade too
e telegraph company. The public interest demands
Congress intended by that act to give to all tele-
anies the same privileges, as was declared by this
xcola Telegraph Company v. *Western Union Telegraph*
U. S., 1. If it did not, or, if the courts refuse to
rights to it, then the valuable consideration secured
Government in being given priority for the trans-
s messages, at a low rate fixed by the Postmaster
ich in ten years, I am sure amounts to more than a
dollars less than is paid by the public for like
olly fails. It is not the policy of this great gov-
demand the services of its agents, without paying
ensation for the same. It is not done in any other
was it intended by Congress in the passage of
t it should be done in this instance. The Tele-
pany, as has been declared by this court, is the
e government. I do not claim the right of the
Company to construct its lines upon the right of
oad companies without paying them just compen-
I do say that just compensation in such cases is
nages, for the reasons stated in the case of *C., B.*
. v. *Chicago*, 166 U. S., 226, and for the reasons
the courts whose opinions are cited in this argu-
ey are not damaged in any sum by it. And I do
right to construct, maintain and operate telegraph
ll post roads is guaranteed to it by Congress, and,
the Supreme Court of Louisiana in *Postal Tele-*
ny v. *Morgan, La. & Tex. B. & S. Co.*, 49 La. Ann.,
ep., 183). "*The act of Congress is paramount so far*
n of the right of way is concerned, and the (State)
s auxiliary to it, and provides for the method of
on and compensation."

the railroads in the United States accepted their
constructed their roads after the act of Congress
1866; of course, subject to the conditions im-

as said by this court in the Chicago
company laid its tracks through the
to the condition, not, it is true, ex-
implied, that new streets of the city
xtended across them as the public con-
under such restrictions as might be
"

ies, like the telegraph companies, are
The breath of life was blown into their
Alone by the grace of a benificent law,
have their being, which is upon the
ublic benefit, the railroads in the trans-
and freight from one section of the
e telegraph companies in the transmis-
ews, by which orders are given for the
es and navies, commerce is given life,
d, and we are in truth made one great,
mmunity. These two mighty agencies
joint heirs of the law; hence the law
om says the railroads must share their
telegraph for the public good; that
hall have the right to construct their
way of the railroads. Just so, they are
o interfere with the ordinary travel
urse, Congress knew from common
n be so constructed, and the limitation
against such careless or reckless con-
hat would interfere with the operation
is common knowledge that a telegraph
railroad right of way much less than
e manner proposed in the petition of
in this case, would not interfere with
ad trains.

an agent of the Government, and as
to construct its lines upon the right of
en though there were no statutes in

xpressly or by necessary implication author-
nnation of the right of way of railroads for
es, under the decision of this court in the case
States, 91 U. S., 375, the Telegraph Company
ny statute of the State, by which just compen-
scertained. The court said: "The investment
of the Treasury with power to obtain the
ation, without prescribing the mode of exer-
gave him also the power to obtain it by any
competent to adjudge a condemnation."
thermore, in that case, said Congress might
the tribunal and mode of ascertaining just
The mode might have been by a *commission*,
been referred expressly to the Circuit Court.

Supreme Court of the United States.

No. 64.—October Term, 1900.

e Southern Railway Company, Plaintiff in Error, *vs.* The Postal Telegraph-Cable Company.	In error to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 7, 1901.]

This was a proceeding commenced by the Postal Telegraph-Cable Company (hereinafter called the telegraph company) against the Southern ilway Company (hereinafter called the railway company) to acquire condemnation the right to construct its telegraph line along and over e railway company's right of way through the State of North Caroa. The petition therefor was filed by the telegraph company in the ce of the clerk of the Superior Court of Guilford County, North Caroa, on June 11, 1898. A summons was issued requiring the railway mpany to appear before the clerk of the Superior Court on June 22, 98, and answer. On that day the railway company entered a special pearance and filed a petition and bond for the removal of the case to e United States Circuit Court for the Western District of North Caroa. Sundry proceedings were had in that court, such as a motion to mand, which it is unnecessary to notice. On August 31, 1898, the egraph company by leave filed an amended petition. On September , 1898, the court made an order by which it directed its clerk to point three commissioners to assess damages, and prescribed their wers and duties. On September 19, 1898, the clerk appointed the mmissioners as directed, and fixed the time and place for their meeting, d on the same day issued a notice to the railway company of his action. ese orders were made on the application of the telegraph company and thout notice to the railway company. Thereupon the railway company ved the court to set aside its order of September 15 and for leave to swer. On September 23 the court temporarily suspended the order of ptember 15. On October 24 an answer was filed, a demurrer of the egraph company was sustained, and when the railway company asked ave to introduce testimony sustaining the averments of its answer the urt overruled the application and refused to permit the railway comny to introduce testimony, and so far as was needed reinstated its order

ing for the assessment of damages by the commissioners and the confirmation of their award by the court, a writ of error and supersedeas was obtained by the railway company, and the case was transferred under such writ of error to the Circuit Court of Appeals for the Fourth Circuit. That court, on March 31, 1899, dismissed the writ of error for want of jurisdiction, on the ground that no final order had been entered in the Circuit Court. (35 C. C. A. 366.) To review this ruling this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The single question we deem it necessary to consider is whether a final judgment or order had been entered by the Circuit Court which could be taken by writ of error to the Circuit Court of Appeals.

Luxton v. *North River Bridge Co.*, (147 U. S. 337, 341,) is decisive of this question. Indeed, little more seems necessary than a reference to the opinion in that case. There, as here, in condemnation proceedings, an order was made appointing commissioners to assess damages. To reverse this order a writ of error was sued out, and by that writ of error an attempt was made to challenge the constitutionality of the act authorizing the condemnation, but this court dismissed the writ on the ground that the order was not a final judgment, saying, after referring to possible proceedings in the State court, that the action of the United States Circuit Court could be reviewed here "only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. (Act of September 24, 1789, c. 20, § 22; 1 Stat. 84; Rev. Stat. § 691; *Rutherford* v. *Fisher*, 4 Dall. 22; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Keystone Co.* v. *Martin*, 132 U. S. 91; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536.)"

Reference is made by counsel to *Wheeling & Belmont Bridge* v. *Wheeling Bridge*, (138 U. S. 287,) in which this court sustained its jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, and inquired into the validity of a judgment of that court affirming an order of a trial court appointing commissioners under a somewhat similar statute. But that decision was based on the fact that the order of the trial court had been held by the State Supreme Court to be a final judgment, on which a writ of error would lie, and therefore, being a final judgment in the view of the highest court of the State, it ought to be considered final here for the purposes of review. But no such ruling obtains in the Supreme Court of North Carolina. On the contrary, that court has repeatedly held that an

ent, nor subject to review until after the confirmation of the award of mmissioners. *American Union Telegraph Company* v. *Wilmington, bia & Augusta Railroad Company*, (83 N. C. 420,) is a case directly nt. In that case a proceeding was commenced by a telegraph ny to obtain a right of way for the construction and operation of egraph lines along the roadway of a railroad company, and, as by the opinion of the Supreme Court, at a hearing before the dge he adjudged the telegraph company entitled to the right of nd appointed commissioners to ascertain and report the damages. empt was made to take this order to the Supreme Court for review, e right to do so was denied, the court saying (p. 421):

pon a careful examination of the statute, and the portions of the act ruary 8th, 1872, by reference incorporated with it, and regarding licy indicated in both to favor the construction and early comple- such works of internal improvement, telegraphic being upon the ooting as railroad corporations, we are of opinion it was not intended e enactments to arrest the proceeding authorized by them at any ediate stage, and the appeal lies only from a final judgment. Then t before may any error committed during the progress of the cause, ade the subject of exception at the time, be reviewed and corrected appellate court, and an appeal from an interlocutory order is ture and unauthorized."

Commissioners v. *Cook*, (86 N. C. 18,) the same ruling was made e prior case in terms affirmed. Again, in *Norfolk & Southern Rail- Company* v. *Warren*, (92 N. C. 620,) the two prior cases were cited pproved. Still again, in *Hendrick* v. *Carolina Central Railroad ny*, (98 N. C. 431,) the same ruling was made, although it appeared e facts were all agreed upon, the court saying (p. 432):

at the defendant broadly denies the plaintiff's alleged rights and nces, and the parties agreed upon the facts, could not give the right al at the present stage of the proceeding, because the order appealed as nevertheless interlocutory, and an appeal from the final judg- ould bring up all questions arising in the course of the proceeding, t denying or impairing any substantial rights of the defendant. e order appealed from is very different from that in the similar *Click* v. *The Railroad Co.*, decided at the present term; in the he court denied the motion for an order appointing commissioners, smissed the proceeding, thus putting an end to the right of the ff therein, and therefore an appeal lay in that case."

changes in the statute referred to by counsel for plaintiff in error, ubsequently to these decisions, may affect the mode of procedure e basis for estimating damages, but in no manner affect the question he finality of the order appointing commissioners.

her does the order made by this court at the last term denying the

ing determined simply our jurisdiction, not that of the Circuit Court of ppeals. That we have jurisdiction in such a case had already been udged. (*Aztec Mining Company* v. *Ripley*, 151 U. S. 79.) Having isdiction to examine the proceedings in the Circuit Court of Appeals, we had found its ruling erroneous, we should have reversed its order missing the writ of error, but as we hold that its ruling was correct, its lgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.